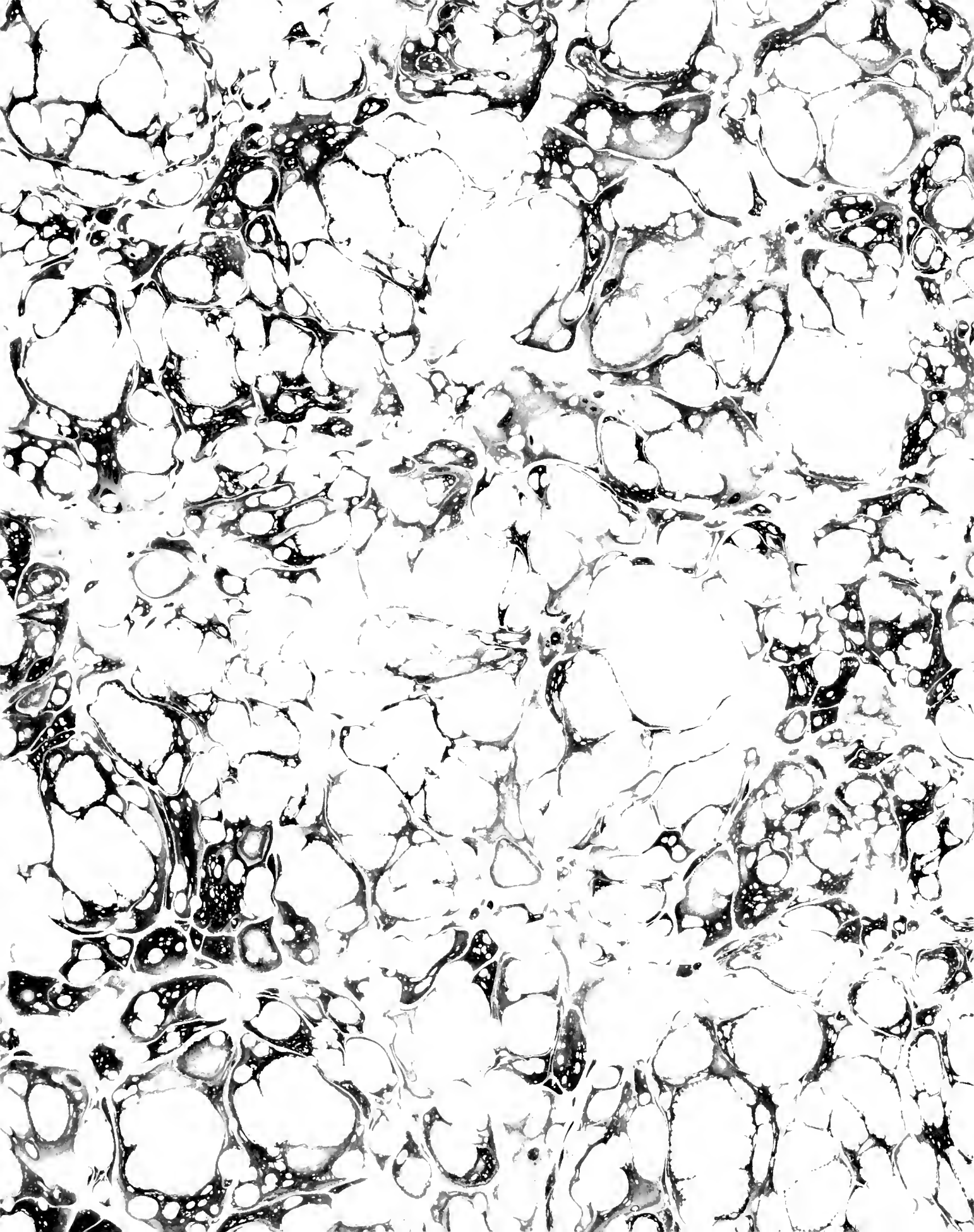

THE SENTIMENTS OF AN ENGLISH FREEHOLDER, ON THE LATE DECISION OF THE MIDDLESEX ELECTION.

[Price Two Shillings and Six Pence.]

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" Wherever Violence is uſed, and Injury done, though by Hands appointed to " adminiſter Juſtice, it is ſtill Violence and Injury, however coloured with the " Name, Pretences, and Forms of Law."

LOCKE on Government, B. II. c. 3.

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THE SENTIMENTS OF AN ENGLISH FREEHOLDER.

CHAP. I.

Every Man's Duty to watch over the Freedom of Elections.—State of the Conteſt between the Houſe of Commons and the Freeholders of Middleſex.—How varied by paſſing Judgment.—The Right of the People to enquire defended, particularly upon the Principles of this Conſtitution.—The Plan of this Enquiry.—Anſwer to the Objection made on the Supremacy of the Houſe, and its Power to declare the Law.—Neceſſity of adhering to the firſt Principles of the Conſtitution.

Every Man's Duty to watch over the Freedom of Elections.

THE right of the electors to be repreſented by men of their own choice is ſo eſſential to the preſervation of all their other rights, that it ought to be conſidered as one of the moſt ſacred parts of our conſtitution. It becomes therefore the duty of a good citizen, to watch every reſtraint impoſed on the exerciſe of that right, *by whatever authority*; and to examine, whether ſuch reſtraint ſtands well and ſufficiently warranted by, that which alone can warrant it, the law of the land; either the ſtatute-law, or that ſound reaſon and well-eſtabliſhed practice which may be called the common-law.

State of the Conteſt between the Houſe of Commons and the County of Middleſex.

During a great part of the laſt ſeſſion of Parliament, we had the misfortune to ſee a conſtant ſtruggle between the Houſe of Commons and the Freeholders of the County of Middleſex. The queſtion between them was, Whether Mr. Wilkes, having been expelled by the Houſe, and re-elected

re-elected by the Freeholders, ſhould, upon ſuch re-election in the ſame ſeſſion, be conſidered by the ſame Houſe as duly elected, and admitted to ſit, notwithſtanding ſuch expulſion? The Houſe, taking up this matter of its own accord, for its own dignity, and in order to give that effect which it thought proper to the reſolution already taken, declared him, in conſequence of that expulſion, incapable of ſitting in *that parliament*. Extenſive as this reſolution ſeemed to be, in time as well as matter, its operation could not have been concluſive beyond the ſeſſion in which it was taken: for it is a known rule of parliament, that no reſolution taken in one ſeſſion can be binding upon the next. Important as it was in matter, if it had continued exactly the ſame, limited in time by the forms and rules of the Houſe to the ſhort duration of one ſeſſion, open to conſideration, and repealable in the next, the inattentive publick might have been inclined to diſregard the diſpute; to give up *perhaps too much* to the privilege and dignity of the Houſe; to acquieſce under its authority, and admit that, though the electors had a right to elect, the Houſe might walk in the trammels of ſome muſty precedent, and object to the admittance of the elected; clap the mace againſt the door, hold it faſt with a ſtrong hand, and refuſe to let him ſit among the pure and chaſte members who aſſemble there.

How varied by paſſing Judgment.

But ſince a late judgment, given by the Houſe in the exerciſe of its judicature, upon hearing the parties with all that ſolemnity which would have better become a hearing where the principal and leading queſtion had not been *prejudged and determined in the abſence of the parties*, this matter is become much more ſerious. It is no longer a declaration of the Houſe of Commons, haſtily and extrajudicially made, and repealable without any difficulty at the meer pleaſure of thoſe who made it: it is judgment given in a cauſe, and a precedent ſet in all its forms to operate in other caſes. The publick might have *ſlept* over a point of privilege, but muſt awake to the conſequences of a formal judgment. The object of the electors choice is alſo changed; and one, who certainly was not elected by the majority of them, is confirmed as their repreſentative, upon the ground of the former declaration carried into effect, by determining, that the ſecond on the poll is to be conſidered as duly elected, in conſequence of the expulſion and declared incapacity of the firſt.

The novelty and importance of this doctrine call upon us to attend to it, and examine it carefully. The judgment given ſtands ſingle, unſupported by any other; open therefore to all reaſonable comment and obſervation; liable to be reverſed by that great authority which can reverſe wrong judgments, the Legiſlature of this kingdom; or to be contradicted in any ſimilar caſe hereafter, by the more mature and better-informed reſolution of the ſame court

Delicate

Delicate as this enquiry may be, we are no free people if we are not permitted to go into it, and to diſcuſs with decency the grounds and reaſons of this judgment. It is not only a modern judgment, and unſupported by any other, but it moſt eſſentially affects the rights of the conſtituents in every part of the kingdom. It may be thought unſafe to leave it unreverſed a ſingle ſeſſion. We know not how ſoon *other expulſions* may take place, and the queſtion be renewed under the prejudice of this judgment remaining on the books. Shall we run the riſque of again proceeding in the dark? Is there any danger in bringing truth to light? If the queſtion ſhould again ariſe, it muſt be decided either by the Legiſlature, in which our repreſentatives are an eſſential part, or by the judicature of the Houſe of Commons, in which they are the only judges. And ſhall we ſtand back with reverential awe, and bow in humble ſilence to gods of our own creating! Or ſhall we not rather take up the enquiry, and do them the juſtice to believe, that a fair and diligent ſearch into *the miraculous powers aſſumed by them*, undertaken without prejudice, and purſued with temper and firmneſs, will be the beſt offering an humble conſtituent can lay upon their altar; far beyond the myrrh and frankincenſe, the precious ointments, the rich veſtments, and the pure gold, from the treaſury of his Gr—— of ——!

The Right of the People to enquire defended, particularly upon the Principles of this Conſtitution.

In this country, the publick has a right upon all occaſions, but moſt particularly upon ſuch as this, to be fully informed. The rules of government drawn from arbitrary ſtates are ill applied to *this*. In *them*, perhaps, it is humane to keep the people in ignorance. Condemned to conſtant oppreſſion, the leſs they know, the leſs they feel their own misfortunes, and the great difference between the condition of freemen and that of ſlaves. But *here*, not only the people have a right to information, but the government cannot be carried on, nor the principles of the conſtitution preſerved, if the maſs of the people is kept in ignorance of that which paſſes. An election, in which *uninformed electors* are called by the King's writ to elect a *fit and diſcreet repreſentative*, is the moſt contradictory thing in politicks that could have entered into the imagination of man. They cannot do *their part* as they are required to do it, upon the return of an election, unleſs the channels of communication are kept open for their information, as well upon the conduct of thoſe they had formerly choſen, as upon the great and weighty affairs of the kingdom, to treat and conſult upon which the repreſentative part of it is called together: otherwiſe, their election is a thing of *hazard and chance only*, and the fitneſs and diſcretion of their repreſentative is not the reſult of any *ſober, well-conducted choice*. The control on the conduct of the elected, by the electors reſuming their powers at the end of the Parliament, and confirming their former choice,

or changing it, as the truſt ſhall have been well or ill diſcharged, is the moſt beautiful part of our conſtitution, and the moſt eſſential to good order, and the rights of the Commons of this kingdom. But that control is a farce, if the electors are to go to their choice *without previous information*; and the election is nothing better than a meer chaos, out of which the wiſe men who went before us, and framed this conſtitution, madly expected to produce ſome beautiful world by a fortuitous concourſe of atoms.

It would indeed be a ſtrange rule that ſhould debar the conſtituents from enquiring into the acts of their deputies. That the Houſe of Commons may aſſume *new powers*, without *due authority*, and much to the prejudice of the electors; and that it may impute to its own acts important conſequences, *not founded in reaſon and uſage*, is undoubtedly true. It is a moſt unfortunate caſe, whenever it happens. But if there ariſe only a bare ſuſpicion of it, the only remedy, that alone which can quiet the conteſt, and "medicine us to that ſweet ſleep which we owned yeſterday," is a full and determined, though painful, enquiry into the foundation of thoſe powers, and the juſtneſs of thoſe conſequences. The purſuit of that enquiry muſt neceſſarily lead to a good event; either to the confirmation of what may have been rightly done, and the reſtoration of harmony and confidence, or to the correction and reverſal of that judgment, which, *if new* and *unauthorized*, cannot be permitted to remain without giving up all the *great principles* of this conſtitution, deſtroying for ever the *freedom of elections*, veſting in the *elected* the power of *chuſing their aſſociates*, and erecting the worſt of tyranny, that which can exiſt only by the perverſion of its authority to the *oppreſſion* of thoſe very perſons from whom it is derived.

The Plan of this Enquiry.

In the examination which I propoſe to give this matter, it will be neceſſary to go back to thoſe *known* doctrines of the law and conſtitution of this country, in which a plain reaſoner would expect to ſee the ground and authority of this judgment. I ſhall therefore, in the firſt place, collect from books of the *beſt authority*, the ſeveral *legal* reſtraints on the general freedom of elections, ſo far as the ſame render or declare any deſcription of men ineligible into Parliament: and ſhall endeavour to ſhew on what principles thoſe reſtraints are founded, and by what authority they exiſt.

If Mr. Wilkes was not under any of thoſe *legal* diſqualifications, his incapacity muſt be argued upon the ground of its being the *implied* and *neceſſary* conſequence of his expulſion. I ſhall therefore, in the next place, conſider the power of expulſion exerciſed by the Houſe of Commons, and the two purpoſes to which it may be directed; either for

puniſhment

puniſhment in the caſe of an *offence* within the criminal juriſdiction of the Houſe; or, in caſes out of the reach of that juriſdiction, for the removal of a member whom the Houſe deems unfit to execute the truſt repoſed in him, and to enable the electors to make a better choice.

Much light will be obtained, by examining *what title* the Houſe can ſet up to the power of diſabling, by direct and expreſs ſentence, any perſon from being elected; *in what caſes* this power has been exerciſed; *in what times* it has been carried to its utmoſt length, and *how long* it has been abandoned. For, if it ſhall appear that this power is not founded in reaſon or practice, it will be difficult to maintain that an incapacity, which the Houſe cannot inflict by an expreſs reſolution and judgment, ſhall follow by implication and inference as the conſequence of a *much milder ſentence*.

It will be neceſſary alſo to examine, how far either precedent or practice, common ſenſe or good policy, ſupport or controvert the concluſion, that incapacity of being elected is the implied conſequence of an expulſion, in either of the caſes which I have mentioned; but particularly in ſuch a caſe as Mr. Wilkes's, where the Houſe expels, not for an offence againſt the Houſe, and within its criminal juriſdiction, but meerly for the *unfitneſs and unworthineſs* of the member.

In this courſe I mean to purſue this enquiry: and I ſhall cloſe it with ſtating the conſequences which I apprehend from the judgment lately given; and in what manner, and to what degree, they ſeem to me to affect the conſtitution of this country.

The field I take is large; but the queſtion to be diſcuſſed is important. It is natural for thoſe who would avoid a full examination of it to endeavour to keep the enquiry more confined. The queſtion in its moſt narrow extent is, Whether, as the Houſe of Commons has the power of expelling its own members, it can alſo declare the conſequences of its own act, and determine what diſqualifications are implied by an expulſion which the ſame Houſe had before inflicted? As this declaration affects the ſeat of the member; and the power of the Houſe to decide the right of ſitting is uncontrolable, and excluſive of all other courts; what that Houſe has declared to be the law, muſt prevail. It is a declaration made by the firſt authority; and thoſe who diſpute it waſte their breath, juſt as they would if they diſputed the judgment of the Lords in an appeal or writ of error.

This, indeed, would be a *ſhort ſolution* of the queſtion, and a *clean removal* of all the difficulties. But the enquiry before us is not, Whether a ſupreme court, having competent juriſdiction, has pronounced judgment? This fact is agreed: and the queſtion ariſes out of it, Whether that judgment is well or ill founded? The deciſion already made may *enhance* the difficulties: it cannot remove them. An enquiry into the rectitude

rectitude of any judgment given by *any court* is no pleaſing taſk. It is more particularly irkſome, when that judgment is given by a ſupreme court, and that court is the *repreſentative of the people*. One hardly expects a fair hearing, having to combat the prepoſſeſſions of the people in favour of thoſe whom they have ſo lately ſent to repreſent them.

However, the important conſequences attending this judgment call the publick to an early examination *of its legality*. The power of precedent is great; and an acquieſcence under this deciſion will ſoon render it the *eſtabliſhed law* of the land. The right of the publick to enquire into its legality is indiſputable. The many fluctuations from time to time in the deciſions of our courts of law, and the many reverſals of unjuſt judgments by act of parliament, cry, Shame upon the man who argues for the conſtant infallibility of ſupreme courts, and a devout and implicit adherence to every thing that they have *once* determined! Had this been the caſe of old, *ſhip-money* would have been collected to this hour; the violences of the *high-commiſſion* and *ſtar-chamber courts* would not have brought on their diſſolution; the *diſpenſing* power of the crown would have been ſtill exerciſed; *petitions* would have been ſtill *adjudged libels*; and members of Parliament puniſhed in the *King's criminal courts*, for their conduct in the Houſe of Parliament. *Exceſſive bail* would have been ſtill demanded; *exceſſive fines* impoſed, and all thoſe violences eſtabliſhed by *legal judgments*, to prevent which our anceſtors interpoſed, obtained many ſalutary laws in the times of the firſt Stuarts, and at laſt eſtabliſhed their plan of liberty at the Revolution. The people of theſe days are certainly not ſo *degenerate*, ſo *loſt* to thoſe leſſons which have been taught them by their anceſtors, ſo *dead* to all good example, as to ſhrink from the enquiry into the legality and juſtice of any *modern* judgments, given in a *new and extraordinary* caſe, and materially affecting their *rights and liberties*.

Of all thoſe judgments, none ſeem more fit for the conſideration of the people at large, than thoſe which are given by *their own repreſentatives* in the exerciſe of their *great unlimited juriſdiction* in matters of election: for none are more important. And all our hiſtorians agree, that no court has been more liable to *error*, nor more open to *abuſe*, than the Houſe of Commons in the deciſion of thoſe matters.

Neceſſity of adhering to the firſt Principles of the Conſtitution.

Doubtleſs it is always uſeful, but upon ſome occaſions it is *particularly neceſſary*, to hold out to ſupreme powers the *implied truſt* under which they are bound to act, and the original ſource of that authority which is veſted in their hands for the *public good*. The firſt principles of the conſtitution ſhould be often looked to. It is an unhappy time, and big with uncertain and fearful events, when it becomes neceſſary to recover thoſe principles, after having nearly loſt them by long neglect. A guard ſhould therefore be conſtantly kept, each deviation from them met in the firſt inſtance, and (by every oppoſition that our conſtitution will juſtify) reſiſted and controlled.

Of

Of thoſe principles, the moſt valuable is that which veſts *in the people* the power of chuſing their own repreſentatives in Parliament. It is by *them* that the conſent of the people is given: and ſo long as the repreſentation is kept pure, according to the principles on which it was from the firſt eſtabliſhed, ſo long the conſent is perfect, and the people enact thoſe laws which they are bound to obey. But if any power whatever, not excepting even the Houſe of Commons, interpoſe in the choice of thoſe repreſentatives, by preſcribing who ſhall, or *any otherwiſe than as the law has directed* who ſhall not, be choſen; that power, great as it may be, muſt ſubmit to a free examination of the *grounds* on which it claims an authority, ſo much out of the ordinary nature of things, ſo alarming at the firſt ſtart of it, ſo deſtructive in its conſequences, ſo difficult to be ſupported in reaſon or practice, ſo deciſive upon the moſt eſſential rights of the people.

CHAP. II.

Qualifications of Candidates, and their Diſabilities at Common and Statute-Law. —The Nature and Principles of thoſe at Common-Law —Aliens.—Minors. —Ideots, and Men deaf and dumb.—Perſons attainted of Treaſon or Felony. —Returning Officers —The Clergy.—The Twelve Judges.—Caſe of the Attorney-General not eligible by ſpecial Order of the Houſe.—Diſabilities by Statute-Law.—Inference from them againſt the Power of the Houſe of Commons to diſable by its own Reſolution.—The Power of the Houſe limited to a Declaration of the Law.—How the Legality of the late Deciſion ought to have been proved.—Proper Mode of proceeding in new Caſes.

Qualifications of Candidates, and their Diſabilities at Common and Statute-Law.

THE qualifications deemed eſſential from the earlieſt times to the diſcharge of the truſt of a repreſentative, are notoriouſly well founded in common ſenſe, and ſimilar to the like qualifications in the execution of other truſts. Theſe, I think, may be properly called qualifications at common-law.

Under this head, rank thoſe limitations and reſtraints which ſtood not in need of any particular ſtatutes to give them authority. Many of them were ſelf-evident, and ſpoke for themſelves: others found their way by analogy; and, having been received in ſimilar caſes by the courts of law, obtained an eaſy eſtabliſhment in the Houſe of Commons.

But there were others, founded in police, regulation, and the balance of the ſeveral powers in the ſtate. Theſe, not being ſelf-evident, nor analogous to any thing elſe in the courts of law, but matters of arbitrary inſtitution, have their authority from acts of Parliament.

Thus

Thus there are ſome reſtraints at common-law, and others by the ſtatutes. I ſhall at preſent confine myſelf to the firſt. Theſe are not arbitrary, to be impoſed at pleaſure by the judgment of *any court*. The Legiſlature alone, which is the united power of the ſtate, King, Lords, and Commons, can enact new reſtraints. Courts of judicature, and Houſes of Parliament acting *as courts of judicature*, have only the power of declaring them: and in the uſe of that power are bound by the law *as it ſtands at the time of making ſuch declaration*. They are founded in common ſenſe. But, as it would have been dangerous to leave to courts, or Houſes of Parliament ſitting in judicature, a vague deciſion of what is common-ſenſe, uſage is admitted as the beſt interpreter of it. When this uſage is collected from the *antient, uniform, and uninterrupted* practice of Parliament, we have the cuſtom of Parliament; and that *cuſtom* is the *law of Parliament*.

Theſe reſtraints therefore do not ſtand ſolely on the deciſion of the Houſe, or the judgment of a court having competent juriſdiction in the caſe: they are much better founded in the *previous uſage*, and the *repeated acquieſcence* of thoſe who are affected by them. They are alſo ſimilar to the like reſtraints at common-law, except in thoſe very few inſtances in which the clear undiſputed uſage of Parliament, not deduced from one, but eſtabliſhed by many precedents and the general tenor of parliamentary proceedings, may have, for very good reaſons not adopted, the practice of other courts. So that an incapacity at common-law to be elected into the Houſe of Commons ſtands in need of the following conditions. It muſt be ſimilar to the like incapacity eſtabliſhed and declared at common-law in ſimilar caſes; it muſt not be repugnant to common-ſenſe; nor contradicted by the uſage of Parliament.

Theſe incapacities extend to;

Aliens. 1. Aliens born. They are not part of the community. They are not the King's liege ſubjects. They are bound indeed to obey the laws of this country while they reſide here: but they owe a conſtant perpetual allegiance elſewhere. They are at common-law under many other incapacities, upon the ſame principle which excludes them from a ſeat in Parliament. For, though they enjoy the rights of men in the protection of their perſons and goods, they have *no civil capacity* incident to men *as members* of this community. They neither *enjoy the rights*, nor *ſhare the burdens*, of citizens. Hence they are incapable of acquiring to their own benefit any real property, except houſes for habitation as neceſſary for trade. They cannot hold any office: they cannot vote in the elections of members of Parliament. And the only inſtance in which they can be called to act in a public capacity proves their ſeparation from the ſtate;

the

the juſtice of the law allowing to a foreigner, tried capitally, the privilege of a jury compoſed of aliens as well as natives.

2. Minors. They likewiſe are ſubject to many other incapacities at common-law. For, being conſidered as not of ſufficient diſcretion to manage their own affairs, and therefore reſtrained from acting for themſelves, they are upon the ſame principle reſtrained from acting in any private or public truſt. They can give no voices in any elections whatever. It follows of courſe, that they are not to be conſidered as ſufficiently diſcreet to be elected into Parliament, and act there in the execution of the moſt important truſt. Minors.

3. Ideots, and men deaf and dumb. Theſe are, upon the ſame principle, and for the ſame reaſon, ineligible; either as having no diſcretion; or as not being able to uſe it, if they have it. Ideots, and Men deaf and dumb.

4. Men attainted of treaſon or felony. From the paſſing of judgment, they are dead in law. Their lives and their eſtates are no longer theirs. They can do no legal act whatever. Perſons attainted of Treaſon or Felony.

5. Returning officers are not eligible for the places in which they preſide as ſuch. There may be more than one objection: but the ſtrongeſt, that which has leaſt form and moſt ſubſtance, is this. They preſide at the election, and judge and determine upon all proceedings there, as well as upon the legality of votes. They cannot therefore be *parties* as well as *judges*, and reap the benefit of their own deciſions. If a judge were to try his own cauſe, I ſuppoſe there can be no doubt that the judgment would be ſet aſide. Returning Officers.

6. The clergy. In thoſe *antient* times into which we muſt look for thoſe cuſtoms which give us our common-law, the clergy were a more ſeparate and diſtinct eſtate than they are at preſent. They uſed to grant their own money. The powers of their Convocation were more extenſive than they now are, and much more frequently exerciſed. They have *even at this time* ſeveral privileges and immunities which diſtinguiſh them from the body of the people. The Clergy.

7. The twelve Judges of Weſtminſter Hall. They are ſummoned by writ to ſerve as aſſiſtants in the Houſe of Lords, and attend there in purſuance of ſuch writ. They are therefore exempted from ſervice in the Houſe of Commons by the law of nature, which I might here call the common-law of all nations, declaring it impoſſible to be at one time in two places. The Twelve Judges.

Theſe, I apprehend, are the *only* reſtraints at common-law on the rights of the electors to chuſe whom they pleaſe. Books of the firſt authority have laid down theſe, and in expreſs words declared *all other perſons eligible*. The grave writers of thoſe books were trifling with their readers in the moſt ſhameful manner, if the reſolution of the Houſe of

Commons can from time to time either *create* or *declare* new diſqualifications.

They are founded in good ſenſe; analogous to the like reſtraints adjudged in other caſes by the courts of law; and confirmed by uſage. They are *not occaſional, but fixed:* to *rule and govern* the queſtion as it ſhall ariſe; not to *ſtart up* on a ſudden, and *ſhift from ſide to ſide*, as the caprice of the day or the fluctuation of party ſhall direct.

Several of them have been ſtrengthened by the aid of ſeveral ſtatutes: but they all ariſe at common-law. Thus the penalty inflicted by the ſtatute of King William the Third, on ſuch minors as ſhall preſume to ſit, is affirmatory of the common-law, and was deſigned to give a further ſanction to a reſtraint, which, though perhaps not inforced in particular inſtances on partial conſiderations, exiſted from the beginning of the conſtitution.

If any lawyer is hardy enough to affirm, that any of theſe reſtraints derive their authority from the *act* of the Houſe; it is a deſperate doctrine, and the ſpirit from which it proceeds is ripe for any miſchief. Our conſtitution does not know *any court* ſo ſupreme as to be above reaſon, ſo abſolute as to be able to *make* a cuſtom under pretence of *declaring* it. And the doctrine here aſſerted is ſuch as would maintain the reſolution of the Houſe to be the law of the land by virtue of its own authority only, notwithſtanding it may have uſage, reaſon, and juſtice, to contend againſt.

Caſe of the Attorney-General not eligible by ſpecial Order of the Houſe.

I am tempted here to give the reader a very particular caſe, in which he will ſee the effect of a reſolution of the Houſe of Commons, repeatedly taken upon much deliberation, in oppoſition to good ſenſe and reaſon, common uſage, and the rights of the electors.

4 Inſt. 48.

Lord Coke tells us, that by ſpecial order of the Houſe of Commons an Attorney General is not eligible. This has induced others to aſſert, that the Houſe can make ſuch ſpecial order when it pleaſes, and thereby render incligible thoſe who were eligible before. The doctrine which I am now combating, that any reſtraint declared by the Houſe is ſufficiently authorized by the act of the Houſe making ſuch declaration, is in effect and ſubſtance that very aſſertion.

This indeed would be a very extraordinary power: and ſince it ſeems to have been admitted, at leaſt in one caſe, by one who was great in Parliament as well as in the courts of juſtice, and if it is good law in one caſe muſt be good law in others, it becomes neceſſary to examine the authorities on which it is founded.

They are theſe:

11 Apr. 12 Jac. after much debate, and ſearch of precedents, the Houſe reſolved; firſt, "That the Attorney General ſhall for *this Parliament* "remain

" remain of the Houſe;" ſecondly, " That *after this* Parliament no " Attorney General ſhall ſerve as a member of this Houſe."

The inconſiſtency of theſe reſolutions is wonderful; and the only proper uſe to be made of them is drawing this ſalutary doctrine, That where power goes beyond right, it finds no reſting-place. It never knows where to ſtop. Sometimes it boldly runs its full length, and creates infinite confuſion. At others, it ſtops ſhort; and the very ſtop, inſtead of removing the offence, raiſes a new objection. In every ſtage, from the beginning to the end, appears the danger of paſſing the bounds preſcribed by law.

I aſk, if Attornies General are not eligible, *by what tenure* did the Attorney General, 12 Jac. continue to hold his ſeat in that Parliament? How came Lord Coke to attend ſo cloſely to the *ſpecial order* contained in the *ſecond* reſolution, as entirely to overlook that which was contained in the *firſt?* What a ground is here laid for extending the juriſdiction and authority of the Houſe! the law *declared* one way by the ſecond reſolution, and a member permitted to ſit *in oppoſition* to that declaration by the firſt! The Houſe muſt have acted illegally, either when it reſolved, that no Attorney General ſhould ſerve, and aſſumed to itſelf in fact a power of *making* the law, and declaring incapacities *never before heard of*; or when it paſſed its former reſolution, diſpenſing with that law, and permitting the Attorney to ſit notwithſtanding ſuch incapacity.

However, inconſiſtent and illegal as this judgment was, it became *a precedent*; and we have an alarming proof here, that precedents are ſet in order to be followed. For, in the Parliament immediately following, 8 Feb. 1620, the Houſe reſolved, " That *the order made the laſt meeting*, " concerning the not ſerving of the Attorney General in this Houſe, ſhall " ſtand:" and a new writ iſſued to elect a member in the room of the Attorney General.

Still our attention is called to the force of precedent. For, 10 Feb. 1625, a new writ is ordered to iſſue, for electing a member in the room of Sir Robert Heath, Attorney General, " *according to the precedent* " 12 Jac."

Here is the law of Parliament three times declared in the ſpace of eleven years, by a court having *competent juriſdiction*. Theſe declarations are made with much gravity, and have every circumſtance that could give them authority; ſearch of precedents, debate, much deliberation, repeated confirmation in times when the Houſe became very reſpectable, and were in force for many years. I find in Lord Clarendon's Hiſtory, that when Herbert was made Attorney General in 1641, " his principal object was " to get out of the Houſe of Commons, for it was not uſual in thoſe " times for the Attorney to ſit in that Houſe." Vol. I. p. 210.

How then came theſe judgments and declarations to loſe their effect? and why, in all the Parliaments from the Reſtoration to the preſent time, have we ſeen Attornies-general ſit unmoleſted? Becauſe thoſe judgments and declarations probably aroſe out of prejudice, certainly were not founded in reaſon, and were contradicted by uſage. It was *folly* to debar a man from ſerving in the Houſe of Commons, where he might be very uſeful to the publick and to thoſe who ſent him, in order that he might aſſiſt *in carrying a meſſage* from one Houſe to the other. The higher and more important ſervice in one Houſe, ſuperſedes the leſs important in the other. The Journals, before 12 Jac. as well as ſince the Reſtoration, *teem with inſtances* of Attornies-general ſerving in the Houſe of Commons, unmoleſted and unqueſtioned.

Theſe judgments, however, ſtill continue in the ſame Journals unreſcinded: but the prejudices under which they were made are worn out, and they are themſelves ſunk in ſhame and ſilence, deſtroyed by their own folly and injuſtice, and entirely torn up by the roots by the ſubſequent uſage, recovering and confirming the rights of the electors. They ſtand in the Journals, illuſtrious monuments of the ſhort-lived efficacy of the reſolution of a Houſe of Commons, againſt reaſon, law, juſtice, and uſage. The writ of ſummons to thoſe whoſe attendance is not neceſſary to the proceedings in the Houſe of Lords, to all under the rank of Judges whoſe attendance *is neceſſary* for very obvious reaſons, operate no longer to the prejudice of the electors. They have recovered their right to chuſe
4 Inſt. 49. thoſe who may be moſt fit to ſerve them. The ſame Lord Coke obſerves, and in the page immediately following, that "the crown cannot grant a "charter of exemption, becauſe elections ought to be free, and the "attendance of the elected is for the ſervice of the whole realm, and "the benefit of the King and his people, and the whole commonwealth "hath an intereſt therein." It is ſtrange that he ſhould be of opinion, that the Houſe of Commons can do in this reſpect what the Crown cannot, and that the *ſame reaſons* do not hold to *reſtrain* that Houſe from rendering ineligible whomſoever it pleaſes, by its own ſpecial order.

Diſabilities by Statute-Law. I ſhall be ſhort upon the next head; the reſtraints by ſtatute-law, and founded therefore in the conſent of the whole community. Theſe are arbitrary, take their riſe from expediency, and are liable to be changed from time to time by that authority which gave them being. Such are the reſtraints which require certain landed qualifications, impoſe certain oaths, diſable certain officers, and all perſons holding penſions from the Crown during pleaſure. Such are alſo thoſe old acts requiring reſiancy in the elected, though now neceſſarily fallen into diſuſe; or perhaps virtually repealed by thoſe acts which, requiring landed qualifications, render the others impracticable. Such alſo are thoſe temporary reſtraints

which

which cancel the former choice by vacating the ſeats of members accepting certain offices, but leave them capable of being re-elected.

If theſe reſtraints could have been eſtabliſhed by any authority leſs than that of an act of Parliament, it is not to be imagined that the Houſe of Commons would have applied to the other branches of the legiſlature, in a matter which entirely concerned itſelf, and its conſtituents in their elections. Though every application riſqued at leaſt the mortification of a refuſal, we have ſeen *in our own times* place-bills, and penſion-bills, tendered at the bar of the Houſe of Lords from year to year, notwithſtanding their only object was the independency of the Houſe of Commons. The great patriots who tendered thoſe bills had forgot Lord Coke's doctrine of the efficacy of a ſpecial order of the Houſe; and never dreamed of that modern doctrine which is the exact counterpart of the other, and tells us, that any reſtraint declared by the Houſe derives ſufficient authority *from that declaration*, and is *good in law*.

Inſtances may be brought of the experiment made, how far a vote of the Houſe might be effectual. The vote has been dropt, and the effect obtained afterwards by an act of Parliament. Thus, in particular, 2 April, 1677, the Houſe came to a reſolution to prevent expences in elections after the teſte of the writ, much in the ſame words as in the act afterwards paſſed, 7 W. III. This was made the ſtanding order of the Houſe at that time. It was renewed and confirmed as ſuch, 23 May, and 21 Oct. 1678. But, to *give it effect*, it became *neceſſary* to paſs an act of Parliament for that purpoſe ſix years after the Revolution.

Inference from them againſt the Power of the Houſe of Commons to diſable by its own Reſolution.

The Houſe of Commons has the right, incidental to its judicature, of declaring what incapacities are legal. But it behoves the Houſe to take care that, inſtead of exerciſing the power *which it has*, it aſſume not *thoſe which it has not*; that, from the temperate and judicious uſe of a *legal power*, veſted in it for the benefit of the people, it ſwell not to the utmoſt pitch of *extravagance and deſpotiſm*, and *make* the law, under pretence of *declaring* it. If it ſhould, the Commons will have reaſon to wiſh that judicature in ſome other court *more eaſily kept in order*.

The Power of the Houſe limited to a Declaration of the Law.

It is much to be lamented that thoſe who maintain the deciſion given in the Middleſex election to be nothing more than a declaration of the law, do not take the uſual way of proving it. If they do not like the liſt of diſabilities already given, let them give their own. Let them ranſack all the books of authority from Lord Coke to Dr. Blackſtone, the Statute-book and the Journals; and, having brought before us ſuch a liſt of *legal diſabilities* as thoſe authorities will ſupport, and they themſelves will abide by, let them ſhew how, *by any conſtruction whatever*, Mr. Wilkes's caſe can be brought within any of thoſe diſabilities; they will have very great

How the Legality of the late Deciſion ought to have been proved.

great merit with the publick, and the queſtion will be moſt chearfully decided in their favour.

But if, inſtead of doing this, they avow it to be *a new caſe*, a diſability *not yet* entered in any of thoſe liſts which are to be found in any of our law-books; nor by any logick or colourable artifice whatever to be brought within the *ſpirit and intention*, if not within the letter, of the law; a proceeding *not compleatly ſupported*, even by a ſingle precedent; the conſequence is too obvious. The deciſion, if it were ever ſo juſt and wiſe to make it, was much *too big* for any thing leſs than the whole legiſlative authority.

Proper Mode of proceeding in new Caſes.

Infinite is the number of caſes, and very frequent the occaſion of their coming to light, in which appears the expediency of new powers in magiſtrates, courts of juſtice, and either Houſe of Parliament. But theſe powers cannot be *aſſumed*. They muſt be derived from a *ſuperior* authority to an *inferior*, from the Legiſlature to either Houſe of Parliament. Thoſe who think ſuch new power neceſſary, muſt be content to fetch it from thoſe who alone have authority to grant it.

CHAP. III.

Expulſion does not imply an Incapacity of being re-elected, in the common Senſe and Meaning of the Words.—The Purpoſes for which the Houſe exerciſes its Power of Expulſion.—For Puniſhment of an Offence.—For the Unfitneſs of the Members.—The Charge againſt Mr. Wilkes explained, as bringing his Caſe under the latter Head.

I DO not find that it has been pretended that Mr. Wilkes was under any of thoſe *legal diſqualifications* which I have already mentioned. But it is ſaid, that the Houſe, having expelled Mr. Wilkes, declared *the legal conſequence* of that expulſion. "This conſequence, we are told, is not "only legal, but neceſſary. It is implied in the very meaning of the "word itſelf. Expulſion clearly, *ex vi termini*, ſignifies a total, not a "partial, excluſion. Every man of plain ſenſe, nay every young academician or ſchool-boy, will tell us, that the meaning of expelling a man "from any ſociety is, that he ſhould *never* be a member of that club, or "of that college, or of that ſchool, any more." This writer appears to put this queſtion on a fair footing, the *common ſenſe* and *meaning* of the words. Another is more on his guard. "He troubles not himſelf with "the *grammatical* meaning of the word Expulſion. He regards only its "*legal* meaning." And this writer joins with all the reſt in labouring in the

The Caſe Conſidered, p. 9.

Anſwer to the Queſtion Stated, p. 37.

the moſt ſtrenuous manner, that that *legal meaning* may be underſtood to be according to the law and cuſtom of Parliament.

Theſe ſeveral writers muſt be met in their own way. And firſt, we muſt totally forget the meaning of words, if we can perſuade ourſelves that expulſion, which is the *leſs* degree of puniſhment, involves diſability, which is the *greater*. There is no underſtanding which does not comprehend the difference between putting a man out of a room, and ſhutting the door againſt him, ſo as to exclude him for ever, or for any limited time. Expulſion is literally the one, and diſability of being re-elected is the other. Does the removal of any thing imply that it ſhall never be brought back? or the diſmiſſion and diſcharge of a ſteward imply that he ſhall never again be reſtored to his truſt? Now removal, diſmiſſion, and diſcharge, are in common ſenſe, as well as in parliamentary language, ſynonymous and equivalent to *expulſion*. They have *all* the ſame effect: they operate *all* to one certain degree. They have their *full* and *compleat* effect, by putting the expelled member out of the ſociety. But incapacity of returning there is ſomething more. If it is intended, it ought to be expreſſed, not implied. An admiſſion in purſuance of a re-election by no means takes off the *effect* of the expulſion. The expelled member is no member of the ſociety. He is juſt the ſame as a new man: and if he is re-elected, he returns indeed into the ſociety, but not to his *former* ſeat or rank there. He enters into it as *the youngeſt member*. Particular ſtatutes may reſtrain particular ſocieties: perſons converſant in college-ſtatutes know that the common expreſſion is, "*Expellatur et in perpetuum excludatur*;" otherwiſe I ſee nothing in common ſenſe that puts it out of the power of a maſter *again* to receive his ſcholar, or the electors of a college and the members of a club *again* to elect an expelled member. Can any man doubt that in clubs and ſchools it has been often done? and if it has, that is enough to ſhew that expulſion and diſability are not, in the common acceptation, ſynonymous and equivalent words. Various difficulties of a different kind may ariſe in colleges. Where thoſe who expel from them have the power of election alſo, it is no more to be expected that the choice will fall on the expelled member, than that, if the only voters for Middleſex were the Members of the Houſe of Commons, Mr. Wilkes would carry his election.

Expulſion does not imply an Incapacity of being re-elected, in the common Senſe and Meaning of the Words.

The Caſe Conſidered, p. 9.

Hence I think it appears, that there is a manifeſt difference between expulſion and diſability, in the common ſenſe and meaning of thoſe words; and I ſhall be able to prove beyond a doubt, that in a *parliamentary ſenſe* this difference has been *conſtantly* obſerved by the Houſe of Commons.

Let us then enquire into the law, the language, and the cuſtom of Parliament, and ſee whether they ſupport or condemn this doctrine.

I take

The Purpoſes for which the Houſe exerciſes its Power of Expulſion.

I take it, that the power of expelling, however it might have been controverted at firſt, is *now* ſufficiently warranted by a very long practice, frequently exerciſed, and, what is more material, confirmed by the conſtant acquieſcence of the electors. It ſeems, indeed, one of thoſe extraordinary powers, which never could have been well eſtabliſhed but by conſent; but the continued exerciſe of it, *without diſpute*, implies conſent, and it is well eſtabliſhed now.

For Puniſhment of an Offence.

This power may be exerciſed, firſt, for the puniſhment of the member *for ſome offence within the criminal juriſdiction of the Houſe.*

Theſe are, offences againſt the freedom of elections, the conſtant and known privileges of the Houſe, its independence and its legal authorities, the freedom of its debates, and the peace and good order of its proceedings.

For theſe the Houſe may puniſh at its *diſcretion*; but that muſt be *real diſcretion*, confining itſelf within proper limits, not an *extravagance* and *wantonneſs* in the exerciſe of great power, paſſing all bounds, and acting arbitrarily and tyrannically, becauſe it is ſupreme, abſolute, and without control.

As it is a power founded on *uſage*, there ought to be great tenderneſs and caution in exerting it in *any new caſe*; eſpecially in thoſe in which the Houſe takes up the charge *ſpontaneouſly*, pledging itſelf as a *proſecutor*, ſometimes as a party, intereſting itſelf in the maintenance of its own dignity, and in the end paſſing judgment under prejudice. We ſhould look carefully for precedents; and as the Journals unfortunately give us precedents of every ſort, in that ſearch we ſhould rather incline to thoſe which furniſh leſſons and examples of *temper and moderation*, than to thoſe which are invidious inſtances of authority and rigour. They ſhould be applied to check and control the exertion of *unlimited power*, by pointing out happy examples of former moderation, or the diſmal conſequences of intemperance and paſſion. They are groſsly miſapplied, when brought to exalt the *pride* of the Houſe, and animate it to *exceſs of power*, merely becauſe there is *no control*, and the like exceſs has been committed in former times.

It is not neceſſary to ſay more on the firſt purpoſe for which the Houſe exerciſes the power of expulſion, for the puniſhment of ſuch offences as are within its criminal juriſdiction: for the caſe in queſtion does by no means come under that head. Mr. Wilkes was clearly not expelled in the laſt ſeſſion of Parliament for any of thoſe which were *at that time* within its criminal juriſdiction.

For the Unfitneſs of the Members.

Secondly, the Houſe exerciſes this power for another purpoſe: for the removal of ſuch members as are found *not fit* to execute their truſt.

Mr. Wilkes's expulſion comes under this head. The charge againſt him was indeed ſo accumulated, that it is very difficult to ſay preciſely *for what* he was expelled; and I can eaſily conceive, that if the queſtion had been put ſeparately for each offence contained in that charge, judgment of expulſion might not have paſſed for either. However, as the Houſe exerciſes this power of expulſion only for the two purpoſes already mentioned, if I prove that none of Mr. Wilkes's offences could at that time be brought within the criminal juriſdiction of the Houſe, it will follow that he muſt have been expelled for his unfitneſs only.

The charge againſt Mr. Wilkes explained, as bringing his Caſe under the Letter Head.

The firſt offence contained in the general charge is, the publication of the North-Briton, Number XLV. This had been taken up in a former Parliament. It was reſolved to be an offence againſt the Houſe of Commons then ſitting; and Mr. Wilkes, being adjudged by that Houſe the Author and Publiſher of it, was expelled. Puniſhed in a *former Parliament*, he could not be brought a *ſecond time* to puniſhment in this Parliament for the *ſame offence*. It would be a libel on the Houſe of Commons to ſuppoſe it thus vindictive, and gratifying its reſentment by departing from the known rules of juſtice.

The ſecond offence contained in the general charge is, the publication of an impious and obſcene libel. This was originally taken up in the Houſe of Lords, in a former Parliament, as matter of privilege. It was afterwards converted into an offence againſt *the State:* the Crown was addreſſed to proſecute, and Mr. Wilkes was convicted. But it was no offence againſt the *Houſe of Commons*, nor in any reſpect within its criminal juriſdiction.

The third offence contained in the ſame charge was, writing and publiſhing a libel in a ſhort introductory preface to Lord Weymouth's letter to the Magiſtrates of Southwark. It is difficult indeed to find a juſt deſcription for this offence. It ſhould ſeem, from the *manner* in which it was taken up in the Houſe of Lords, and the *offer of lenity* which their Lordſhips were pleaſed to make to Mr. Baldwin, the Publiſher, if he would inform againſt the Author, that it was at that time conſidered there as a *breach of the privilege* of that Houſe. For, if it is taken in any other light, I do not ſee what *lenity* their Lordſhips had to offer. They muſt know, that, except in reſpect to the breach of their privilege only, as they could inflict *no puniſhment*, ſo they could ſhew *no mercy:* they could neither *pardon* the offence, nor *mitigate* the ſeverity of any ſentence.

In hopes of this lenity, and conſequently under terror of puniſhment, Mr. Baldwin informed againſt Mr. Wilkes. It was *then* voted, an inſolent, ſcandalous, and ſeditious libel, tending to inflame and ſtir up his Majeſty's ſubjects to ſedition, and to a total ſubverſion of all good order and legal government. The information laid before the Lords, and their

reſolution upon it, were communicated by one Houſe to the other. Their Lordſhips had ſtarted very good game: the Commons had the honour of hunting it down. If Mr. Wilkes had offended againſt the privilege of any of the Lords, ample atonement was made: for the Houſe, with all *proper humility*, and *reſpect to their Lordſhips*, expelled its own Member. But as to the *offence againſt the State*, though the Commons concurred with the Lords in their reſolution, declaring it one of the higheſt miſdemeanors that a ſubject could commit, no addreſs for proſecution went from either Houſe. Nothing indeed appears to have been in the view of either of the Houſes, or of his Majeſty's Adminiſtration, but the expulſion: and that great object being obtained, the offence againſt the State remains unnoticed and unproſecuted. And this is the more extraordinary, becauſe, when Mr. Wilkes was charged with being the Author of this deſperate libel, he did *more than confeſs it:* he aſſerted it as his own; and he declared, that he *gloried* in being the Author of it.

Whatever this libel was, and however common underſtandings may be puzzled by the different modes in which it has been taken up at different times, and in different places, and at laſt entirely dropped as a State offence; it is very eaſy to ſay *what it was not*. It was not any of thoſe offences which are within the criminal juriſdiction of the Houſe of Commons. Since therefore of the three offences for which Mr. Wilkes was expelled, only one of them was *at any time* within the juriſdiction of the Houſe, and *for that offence* Mr. Wilkes had been *before* puniſhed, it follows that in the laſt ſeſſion of Parliament he was expelled merely becauſe he was unfit and unworthy to ſit as a Member of Parliament. Without troubling the Reader with the ſeveral proceedings upon his repeated re-elections, and the returns made by the Sheriffs, the ſeveral reſolutions of the Houſe bring before us this queſtion: Whether, where a Member has been expelled merely for his *unfitneſs* and *unworthineſs* to repreſent thoſe who choſe him, the conſequence will hold good, that he *thereby* becomes incapable of ſitting in Parliament, and the next on the poll is to be admitted as duly elected?

CHAP.

CHAP. IV.

The Power of the Houſe to diſable by expreſs Sentence, conſidered.—Arthur Hall's Caſe and Dr. Parry's rejected as bad Precedents.—The reſt of the Precedents ſtated.—Whitlocke no Authority in this Caſe.—This Power not founded either in Reaſon or Precedent.—Particular Conſiderations on it when exerciſed for Puniſhment.—Impoſſibility of ſupporting it for that Purpoſe by any Cuſtom of Parliament.

The Power of the Houſe to diſable by expreſs Sentence conſidered.

ONE would imagine, that thoſe who maintain the conſequence ſtated at the cloſe of the laſt chapter, were well prepared to maintain the right of the Houſe to diſable by expreſs ſentence. For, if upon enquiry it ſhould be found, that the Houſe neither *has* ſuch right, nor *ought to have it*, it would be a very unnatural concluſion that ſhould ſlip it unawares upon us as the conſequence of a much more moderate puniſhment.

It will be proper therefore to conſider, in what caſes and in what times the Houſe has exerciſed this power; how extravagantly it abuſed it; and when it appears to have laid aſide and abandoned it. I ſhall lay before the Reader all the caſes which I have heard of in their order of time, without making any diſtinction at preſent on the different purpoſes for which I have already ſaid the Houſe has exerciſed the power of expelling its Members. For I mean in this chapter to controvert generally the power of the Houſe to diſable by its expreſs reſolution for that purpoſe.

Arthur Hall's Caſe and Dr. Parry's rejected as bad Precedents.

14 Feb. 1580, Arthur Hall was *removed*, *ſevered*, and *cut off* from being a Member *during the continuance of that Parliament*.

15 Feb. 1584, Dr. Parry was diſabled to be any longer a Member of that Houſe.

Before I proceed to the other precedents, I muſt ſtop a little at theſe, and make a few remarks upon them. Some precedents deſtroy themſelves. No ſober man will rely on the authority of proceedings in which there appears a manifeſt abuſe, a daring illegality, and a ſlaviſh ſubmiſſion to power. Such proceedings are vicious in the whole as well as in part; and ought never to be quoted in *order* to be followed. Hall's offence was, reflecting on the proceedings of the Houſe, publiſhing a diſcourſe to the diminution of its authority, and aſſerting, among other things, that the Houſe had judged and proceeded untruly. For this offence the Houſe thought proper, in addition to the puniſhment already mentioned, to *impoſe a fine*; to ſet that fine at no leſs than 500 *marks*, a very great ſum in thoſe days; to impriſon him for *a time certain*, ſix months, and from

thence till he ſhould make a recantation. Unleſs therefore we are inclined to maintain the authority of the Houſe to *fine*, and in *any ſum it pleaſes*, and to impriſon *as long as it pleaſes*, without any limitation to the continuance of the ſeſſion, we muſt reject this precedent as an inſtance only that the Houſe of Commons may be led, by its intemperance and paſſion, in the purſuit of its own dignity and the puniſhment of thoſe who offend againſt it, to an abuſe of its power, and the exertion of an authority which it has not by law. Dr. Parry was charged with high treaſon. He was probably a madman; but, if he had been ever ſo ſober, the conduct of the Houſe of Commons towards him was enough to drive mad the moſt ſober man. For while he lay under the charge, *before his trial*, that Houſe paid its ſervile court to the Queen, by prejudging the ſentence of the law, and praying her leave to paſs a bill for his execution after conviction, in ſuch a manner as might be fitteſt for his extraordinary and moſt horrible kind of treaſon. There is in this proceeding an inhumanity towards the criminal, as well as an abject ſervility towards the Crown, which will I truſt prevent its being ever quoted as a precedent to be followed in any Houſe of Commons.

The caſe of Sir Edmund Sawyer.

21 June, 1628, Sir Edmund Sawyer was, *by three ſeparate reſolutions*, expel'ed, committed to the Tower, and declared unworthy ever to ſit as a Member of that Houſe. His offence was, tampering with a witneſs, one Dawes; and adviſing him, as he was not on oath, not to tell the Houſe what he knew of a matter wherewith Sir Edmund Sawyer was charged.

9 Nov. 1640, the Houſe availed itſelf of the temper of the times; and, relying on the general diſcontent at the abuſe of the prerogative, came to a reſolution as inſupportable in law, as that abuſe which it pretended to correct. For it reſolved, that all projectors and unlawful monopoliſts ſhould be diſabled from ſitting in that Houſe: and 21 Jan. following, declared Mr. Wm. Sandys, Sir Jo. Jacob, Mr. Tho. Webb, and Mr. Edmund Wyndham, within that order, and therefore perſons who ought not to ſit in that Parliament.

27 May, 1641, John Taylor was expelled, and made incapable of ever being a Member of that Houſe, for having declared, that to paſs the bill of attainder of Lord Strafford, was to commit murder with the ſword of juſtice.

30 Oct. 1641, Fitzwilliam Cogniſby was reſolved to be a monopoliſt within the order 9 Nov. 1640, and a new writ iſſued.

2 Nov. 1641, H. Benſon was declared unworthy and unfit to be a Member, and that he ſhall ſit no longer. He was ſent for as a delinquent; a new writ was ordered; and then, *by another reſolution*, he was declared unfit and uncapable ever to ſit in Parliament, or be a Member of that Houſe hereafter. His offence was, granting and ſelling protections.

2 Feb.

2 Feb. 1641, Sir Edw. Dearing was *expelled* and *diſabled*, for publiſhing a book againſt the honour and privilege of the Houſe.

9 March, 1641, Mr. Trelawny was *expelled* and *diſabled* to ſit as a Member of that Houſe during that Parliament. His offence does not appear on the Journals: but Lord Clarendon informs us, that it was on a charge of denying the power of the Houſe to appoint its own guard.

In the following year, 1642, the precedents grow upon us ſo abundantly, as to loſe all pretence to authority. In thirty-five different places in the Journal of that year, Members are rendered incapable of ſitting. Forty-nine were expelled in the months of Auguſt and September; and moſt of them, I believe I may ſay all of them, were declared incapable of ſitting.

The majority was plainly clearing the Houſe of their obnoxious brethren. To render their policy *compleat*, and better ſecure to their order of incapacity the *effect intended*, new writs were ſeldom iſſued at the time of the expulſion; and frequently not iſſued at all.

No wonder that the licentiouſneſs of the Houſe infected the Army. When that Houſe, which is for *check* and *control*, and to keep the other powers within the limits of the law, becomes itſelf a *tranſgreſſor* of that law, and aſſumes to itſelf an abſolute authority againſt law, the other powers will follow the example, and that which holds the ſword be found the ſtrongeſt. Thus the army, in 1648, impriſoned forty-ſeven, and ſecluded ninety-ſix, Members of the Houſe of Commons. And in 1656, upon the meeting of a new Parliament, the Protector made order, that no Members ſhould be admitted to take their ſeats there, unleſs they brought a certificate of their good diſpoſition from the Lord Protector's council.

Out of this confuſion aroſe order; and from the Reſtoration to the preſent time the ſentence or puniſhment has never gone beyond expulſion, except in a few inſtances of Members diſabled from being elected at *particular boroughs*, on proof of a *corrupt influence* obtained in them.

Whitlocke has been quoted as a great authority for this power in both Houſes of Parliament: and he goes ſo far as to ſay, that the Houſe can diſable the offenders from ſitting in *that or any other Parliament*. He quotes for his authority the Journals of both Houſes, but no particular places or dates. His authorities, if we were to ſee them, would be drawn principally from thoſe times of confuſion in which he lived, and was an active Member in thoſe very precedents. That *he* ſhould continue to revere them to the day of his death, was natural enough. But it is ſurpriſing that, in theſe times, any man of *learning*, and of a *cool and deliberate temper*, ſhould adopt Mr. Whitlocke's ſayings without ſuſpecting his authorities, and not rather revolt at the extravagance of a doctrine which extends the power of diſabling, by a vote of one Houſe only, even to another

Whitlocke no Authority in this Caſe.

ther Parliament. Where *part* of the aſſertion is indiſputably *falſe*, doubts will ariſe upon *the reſt* in all minds not determined to adopt whatever might anſwer the preſent purpoſe.

Stopping therefore with the year 1641, and not going up to thoſe ſhameful precedents of Dr. Hall and Dr. Parry, we have ſeven precedents of the Houſe exerciſing a power of diſabling by expreſs ſentence. If I knew more I ſhould not be afraid to ſtate them. I am ſufficiently compoſed upon this matter; and, truſting to thoſe *barriers* which are viſibly marked in our conſtitution, have no fear of any weight of *precedent* that may be brought againſt me. Of thoſe ſeven precedents, I might well object to two as manifeſtly illegal, being founded on an order of the Houſe againſt projectors and monopoliſts, in which the law was avowedly *made* by that Houſe only, not *pretended to be declared*.

But let the whole liſt be ſuppoſed to apply, and with full effect; they are a *ſcanty number* to ſupport ſo extraordinary a power. That of expulſion is great: it may be uſed to diſgrace, to harraſs, to ruin, an *individual*; but it carries with it no *public danger*. If the Houſe abuſe its power in the exerciſe of it, the electors have their remedy, by re-electing the expelled Member. It was probably the ſenſe of this remedy *being in their own hands*, that prevented their queſtioning this right when it was *firſt* exerciſed. It is the ſame ſatisfaction, the ſame perſuaſion of their own ſecurity, that has kept them quiet ever ſince, and will probably for ever ſtop all controverſy, if conſequences *equally dangerous and new* are not imputed to the ſentence.

But when incapacity of being re-elected is ſuper-added to the expulſion, it is no longer the caſe of an individual; the rights of the electors are moſt materially affected. A ſtop is put to the freedom of their election. The number of perſons open to their choice is diminiſhed: and though that diminution is in *one only*, that ſingle perſon may be their firſt favourite, and perhaps on that account rendered incapable. Nor does the evil ſtop here: this is only the *beginning* of *ſorrows*. The elected learn to taſte the ſweets of culling their company, not only by *removing* troubleſome opponents, but barring their re-entry; and, by putting a negative on the *firſt* intereſt in any place, make room for the *ſecond*. Reaſon cries aloud againſt ſuch a power *in any ſet of men whatever*. Happily we find her ſupported by no conſiderable liſt of precedents, except in eighteen years of confuſion from 1642 to 1660. And when we ſee this power *ſo ſeldom exerciſed* in old times, *ſo groſſly abuſed* in thoſe, and *ſo entirely abandoned* ſince, we cannot but conclude that *uſage diſclaims* the power as much as *reaſon proteſts* againſt it, and that it *does not exiſt* in our conſtitution.

If I were to admit this power in any caſe, it ſhould be where the Houſe exerciſes a criminal juriſdiction in offences properly within the cogniſance

cogniſance of the Houſe, and puniſhes *at its diſcretion*. If, in ſupport of ſuch a caſe, I ſaw a ſtrong uniform cuſtom from the earlieſt times, I might lament the uncertainty of human diſcretion, which, while it puniſhed the offender, was inattentive to the rights of the innocent. But I might deem myſelf precluded *now* from diſputing the validity of ſuch a cuſtom, and might hold it ſafer to be conſiſtent, and "*ſtare ſuper vias antiquas*," than to render every thing uncertain by departing from an eſtabliſhed cuſtom. Where the Houſe has a power to puniſh *at its diſcretion*, it is a deſirable thing that the limits of that power ſhould be fixed by a known and well-eſtabliſhed uſage.

But fortunately there is no ſuch uſage in ſupport of this power. Precedents in a ſupreme court which cannot be controlled, and acts without appeal elſewhere, are good authorities for what that court *cannot* do, or *ought not* to do: but they ſhould be taken with miſtruſt, when they are brought to prove what it *can do in the fulneſs of its power*. They ſhould be clear, uniform, and conſiſtent; collected from the earlieſt parts of our hiſtory, ſet in ſober and temperate times, and ſtrictly applicable to the caſe in queſtion.

Impoſſibility of ſupporting that Purpoſe by any Cuſtom of Parliament.

Indeed it would be folly to look into the antient hiſtory of Parliaments for ſuch a cuſtom. Yet, fooliſh as it is, we muſt look there for that *conſuetudo Parliamenti* which is to be the ground of this or any other declaration of the law and cuſtom of Parliament. It is a moſt unhappy caſe when that antient hiſtory, which ſhould *ſupport* the declaration, ſets before us known and indiſputable facts in *direct oppoſition* to it.

In antient times, the attendance in Parliament was not a privilege, but a ſervice; and ſuch as men wiſhed to be excuſed from. They were compellable to undertake the office. Inſtances may be produced from the year books, and other antient records, of applications made for charters of exemption. Our law-books ſufficiently inform us of that fact when they tell us, that ſuch charters are illegal, and if granted are void. If in thoſe times incapacity had been propoſed in any caſe, it would have been thought a ſtrange puniſhment that ſhould diſcharge the criminal from undertaking the burden. It is not to be expected from the diſcretion of the court of King's-bench in our time, that part of the *puniſhment* of offenders will be an incapacity of ſerving the ſeveral burdenſome offices which they are now compellable by law to take upon them.

Incapacitating a Member of Parliament, is at all times *puniſhing the conſtituents* in ſome degree. For they not only loſe the benefit of their former choice, but are diſabled from renewing it if they think proper. But in old times it would have been particularly abſurd, as the offender would have rejoiced in his exemption from the ſervice, and the conſtituents been the only ſufferers.

If this cuſtom of Parliament is to be determined on the principles of the common-law, it will be impoſſible to maintain it: for there was clearly a time when it could not have obtained. If there ever exiſted a time when the ſervice was not in the eſtimation of mankind an advantage, it is impoſſible that at that time incapacity could be a mode of puniſhment. That there did exiſt ſuch a time, will not be controverted: and all lawyers agree, that That is no cuſtom, the commencement of which can be proved. The precedents therefore, ſuch as they are, are quite inadequate to the maintenance of this power, when exerciſed for puniſhment: for it is not *in the nature of things* that thoſe precedents ſhould be founded in, that which alone can give them authority as good precedents, the law and cuſtom of Parliament.

In the next chapter I ſhall conſider how far this power is juſtifiable, when exerciſed on account of the unfitneſs and unworthineſs of the Member.

CHAP. V.

No Power in the Houſe to diſable for Unfitneſs only.—It can expel, but the Electors can re-elect.—The Conſequences conſidered, as well where the Houſe abuſes its Power in expelling a good Man, and refuſes to receive a Member legally elected, as where the Electors perſevere in ſending a bad Man back to Parliament.

No Power in the Houſe to diſable for Unfitneſs only.

IF there are ſtrong objections to this power of diſabling, when it is exerciſed for the puniſhment of an offence, there are ſtill ſtronger when it is exerciſed for the unfitneſs and unworthineſs of the Member.

He is unfit. For what? To keep company with the reſt of the Houſe! With great deference let me ſay it; they have no authority to aſk that queſtion, and make that enquiry. They muſt keep ſuch company as the electors are pleaſed to ſend them, not being diſqualified according to the known laws of the land. They are not a *voluntary* ſociety to chuſe their own company, and meet whom they pleaſe; to caſt a black-ball againſt thoſe whom they do not like, and then contend, that it would be trifling, nugatory, ridiculous and inconſiſtent, to re-admit into the club the man who had a few days before been expelled from it.

They muſt not aſk, whether the man whom the electors have choſen is fit company for themſelves. That election is the authority by which he acquires a right to be admitted. His title is, that he is choſen by his conſtituents, not that he is adopted by the Houſe. He derives his full

powers from thoſe who ſent him. The reſt of the elected, as ſuch, are *not parties* to his election: they gave *no voices* at it, and they have *no negative*. The Houſe has no authority to try, whether his electors have made their choice wiſely or otherwiſe. They can only try, whether he is duly elected; and whether, at the time of his election, he was under any diſqualification, either at the common or the ſtatute-law. If he was *duly elected*, and not *legally* diſqualified, his electors may lay claim to his admiſſion, not as matter *of grace and favour*, but as matter *of right*.

If any crime appears to have been committed by him ſince his election, or, having been committed before, is now for the firſt time proved upon him, the Houſe may interpoſe *for one certain purpoſe*, and no other. It may conſider, whether this criminal is fit to execute the truſt which has been placed in him; and it may decide that queſtion in *the firſt inſtance*.

The only reaſonable ground, upon which this power in the Houſe can be juſtified, is this. It is a fair preſumption, that if the electors had known, at the time of the election, that this man was capable of committing ſuch offences, they would not have choſe him. The Houſe therefore ſteps in, and, by a kind interpoſition of its authority, expels the Member, cancels the former choice, and enables the electors to go to a freſh election.

But that election muſt, according to the terms of the ſtatute, 7 H. IV. be "freely and indifferently made, notwithſtanding any requeſt or com-"mandment to the contrary." It would be a manifeſt perverſion of the beſt thing to the worſt purpoſe, if the judicature of the Houſe of Commons was to be turned againſt the freedom of elections. A negative put by the Houſe on any perſon, who was eligible the day before that negative was given, is as much a commandment, as any thing that ever appeared in the King's writ, or in his letter to the Sheriff. Neither the Crown nor the Houſe of Commons can interpoſe. The electors are in the exerciſe of that great right, on the preſervation of which they muſt depend for the continuance of their freedom, and the ſecurity of their property: and *they* are now become the judges in whom they may beſt place their truſt.

They may conſider, if they pleaſe, the fitneſs of their former Member. Human nature is frail. Prejudices may exiſt, *even in a Houſe of Parliament*. The expelled Member may be the moſt fit; and the electors wiſely reſolve to truſt no other perſon. Or the fault may be *on their part*: caprice and peeviſhneſs may govern the huſtings; and a bad man be ſent back to Parliament.

It is an unhappy caſe, when this difference ariſes between the electors and the elected: but there is nothing fatal in it, if the rights of each are

well underſtood. It is an evil, in ſome degree, inſeparable from the frailties of human nature, and the frame of our conſtitution.

An Houſe of Commons, poſſeſſed of great powers, *may* abuſe them, and expel a *good* Member. There is no offence in ſuppoſing this a *poſſible caſe* in any great aſſembly, open to the prejudices, and ſubject to the frailties, of mankind. In this caſe, one cannot help hoping that the firmneſs of the electors would control the violence of the elected. The public attention would be drawn to the uncommon conteſt. The Houſe might be diſgraced in the opinion of reaſonable men. The recovery of its authority will not be difficult, if it act with temper and moderation: but peeviſhneſs and paſſion will render the caſe deſperate. At all events, one knows the worſt. That Houſe, which, having abuſed its power, perſeveres in the abuſe, works *its own diſſolution*. Frequent elections have not been uſed to be thought *grievances*. Sudden diſſolution would be the beſt *check* upon the conduct of the elected, and the moſt effectual means of preventing expences in the elections. The *example* would do good: future Houſes would learn a *leſſon* very uſeful to them and to their conſtituents.

I have ſtated the conſequences, where the Houſe has not only acted wrong in the firſt inſtance, but perſevered in it. Now let us ſuppoſe, that the obſtinacy of the electors has led them *again* to make a bad choice. "*Grex totus in agris unius infectus ſcabie cadit*," applies not to the Houſe of Commons. Mr. Wilkes himſelf might have been admitted there long ago, without the leaſt danger of ſpreading the infection. Whatever may be the crimes which have brought on his puniſhment, they are not likely to take deep root in the Houſe of Commons, and to thrive in that ſoil. I have always thought it a groſs affront to the Houſe of Commons to imagine, that one bad man can do any miſchief in it. It puts the Members there on the footing of old maids and prudes, who are afraid to let ſin come near them, leſt they ſhould be tempted to taſte it.

On the other hand, to render incapable by a *vote of the Houſe only*, and to keep the door conſtantly ſhut againſt, any man *legally* elected, upon a *groundleſs* alarm and apprehenſion of *imaginary* dangers, is moſt effectually deſtroying the freedom of elections, and overturning the conſtitution. If the vote of the Houſe is ſufficient to make a *new* law, it will ſoon have ſufficient authority to repeal the *old*. If any Houſe of Commons can, by its reſolution, render any man whatever *ineligible*, who was by the law of the land *eligible before* ſuch reſolution, the ſame Houſe is *above all law*; can continue its duration beyond the term of ſeven years; and can alter, repeal, and diſpenſe with, acts of Parliament, at pleaſure.

If the elected have a right to ſay *who ſhall not* be their comrades, they will ſoon acquire influence enough to ſay *who ſhall*. They will no longer attend to the intereſt and wiſhes of *their conſtituents:* They will look for ſecurity

ſecurity and power to *their own body*. The Miniſter will adviſe the Sovereign, to perplex himſelf no longer with romantic ideas of reigning in the hearts or affections of his ſubjects, or to riſque the prerogative by overſtraining it. Corruption will be taught to flow in copious ſtreams from the Treaſury to the Parliament, and the King will govern by reſolutions of the Houſe of Commons. It is difficult to imagine, that the condition of the people can be made worſe by any future event: and that Miniſter will be a good ſervant to his Maſter, who ſhall give this turn to ſo diſtempered a ſtate. If he does not, the hiſtory of our country, little more than a century ago, ſuggeſts to us fears and apprehenſions of the revival of the like evils: a diſordered Commonwealth riſing out of the ruins of Monarchy, and petty tyrants oppreſſing thoſe from whom they derive their authority.

The end is ſufficiently anſwered by the removal of the unworthy Member. The objection, that the Houſe may then be obliged to receive the man in one week, whom it had deemed unworthy the week before, is an objection which ariſes from miſtaking the *ground* upon which the power of expelling in this caſe ſtands founded. It is not for puniſhment: that belongs to the King's *criminal courts*. It is not for the dignity or pride of the Houſe, which has *no negative*, but *muſt* receive ſuch perſons as, being eligible by the *law of the land*, are ſent there by the *body of the people*. But it is for the ſecurity of the electors: not to compel them *to make a change*; but to enable them, if they think fit, *to make a better choice*. By the expulſion, the electors are releaſed from the choice which they had *unwarily* made: and they return to the election, free from every reſtraint, except what had been impoſed upon them by the *law of the land*; the common-law, founded in reaſon, and confirmed by uſage; or the ſtatute-law, enacted by general conſent. By going further, we depart from *that law*; we wander without a *guide*, and without *reſtraint*; we run wild in the purſuit of *we know not what*; every ſtep we take involves us in *greater evil*; we grow *wiſe*, and *repent too late*, when we can find no remedy.

CHAP. VI.

Difference between Expulſion and Diſability marked in the Language of Parliament.—Argument drawn from expelled Members not having been re-elected, anſwered—Mr. Walpole's Caſe, 1711, conſidered at large—Mr. Sloane's Caſe at Thetford.—Mr. Woolaſton's Caſe.—Caſes of Malden and Bedford.—Mr. Wilkes's Caſe not one of thoſe in which Conviction in the King's Courts works an Incapacity of holding Offices of Truſt.

Difference between Expulſion and Diſability marked in the Language of Parliament.

IT appears, I hope, from what I have ſaid already, that the power of diſabling by expreſs ſentence is not founded either in reaſon or precedent; that it is inconſiſtent with, and deſtructive of, the great principles of our conſtitution; and that it was not poſſible, in the nature of things, that it could have exiſted in the beginning of our Parliaments. One might reaſonably hope that it would not be diſputed, that what *cannot be done* by the expreſs reſolution of the Houſe for that purpoſe, will *ſtill leſs paſs* by implication, and as the conſequence of a much milder ſentence. This, however, is diſputed; and it is ſtill contended, that, in the *language* and according to the *law and cuſtom of Parliament*, expulſion implies a diſability.

In ſupport of this aſſertion, I expected a great deal of learning, and I have not been diſappointed; but it is, *for the moſt part*, learning which does not apply to the queſtion. Let men write ever ſo voluminouſly on the judicature of the Houſe of Commons in matters of election, on its excluſive juriſdiction *if they think proper*, on its power of puniſhing its own Members; all they can ſay on theſe points will never prove that the conſequence, contained in the aſſertion juſt mentioned, is well and truly drawn; either according to the common ſenſe and meaning of the words, or according to their legal meaning, or as they have been always underſtood in a parliamentary ſenſe.

The different meaning of the words *expulſion* and *diſability*, in a parliamentary ſenſe, and the difference in the degree of puniſhment inflicted under thoſe words, will manifeſtly appear to the Reader, if he will take the trouble of looking back to the fourth chapter. There he will ſee, that in Arthur Hall's caſe, which may be a good precedent for the *forms* of Parliament, though a very bad one for other purpoſes, the diſabling part of the ſentence was much *more than was neceſſary*, if the bare *removal* would have involved the reſt. Sir Edmund Sawyer, Taylor, Benſon, Sir Edward Deering, and Trelawny, are not only expelled, but, *by additional words* in the ſentence, diſabled to ſit. Much in the ſame times we find,

that in ſome inſtances the Houſe ſtopped at expulſion. For, 13 Feb. 1606, Sir Chriſtopher Pigott; 16 Feb. 1620, Mr. Shepherd; 21 Mar. 1620, Sir Ro. Floyd; 23 Apr. 1621, Sir J. Bennett; were expelled, but not diſabled.

How ſhall we account for theſe diſtinctions, ſo ſtrongly marked in theſe ſentences? Why were ſome expelled? others diſabled? Where diſability was intended, why was it thought unſafe to reſt it on the ſentence of expulſion? Why was the Houſe ſo guarded in its proceedings, as to make diſability, by another reſolution, a *part of the ſentence*, even where the expulſion had been already ordered, as it was in Sir Edmund Sawyer's and Benſon's caſes? Reflecting in this manner on theſe proceedings, I can no more perſuade myſelf, that in the language of Parliament expulſion implies diſability, than that in the language of the law *hanging* for high-treaſon implies drawing and quartering, and all the other parts of the judgment for that offence. Nor do I think it more extraordinary, that an expelled Member ſhould return to the Houſe, if his conſtituents are pleaſed to re-elect him, than that a criminal tranſported for *ſeven years* ſhould preſume to return home at the expiration of that term, inſtead of ſtaying abroad *for life*.

Argument drawn from expelled Members not having been re-elected, anſwered.

When this aſſertion is to be defended upon the law and cuſtom of Parliament, one naturally expects a long ſtring of caſes, adjudged in temperate times, and ſtrictly applicable to the matter in queſtion. How is one ſurprized to find the principal ſtand made at one poor piece of *negative evidence!* We are told, that there is not an inſtance of an expelled Member being re-elected, till Mr. Walpole's caſe in 1711. I ſhall ſhew preſently, that Mr. Woolaſton was expelled and re-elected in 1698. Others have ſhewn the ſame thing of Sir William Pennyman and Mr. Holborne. But if neither they, nor Mr. Walpole, nor Mr. Wilkes, nor any other expelled Member, had ever been re-elected, all this would not have amounted to a proof, that the electors might not have choſe them if they had thought fit.

It was not indeed to be expected, that they would elect men loaded with the cenſure of the Houſe of Commons. If we find them inclined to do ſo *now*, their never having done ſo *before* does not conclude againſt their right of doing it when they pleaſe. We may, indeed, be driven to confeſs a diſagreeable truth: that the Houſe of Commons has *no longer* that authority over the minds of the people, which it had *formerly*. By authority, I do not mean *external power*, and that ſtrength which *compels* obedience. But I mean that influence over the minds and opinions of a *free* people, which can reſult only from full and perfect evidence, of *dignity* in the debates of the Houſe, *prudence* in its counſels, *integrity* in its judgments, *impartiality* and *independence* in its general conduct. Authority

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founded on *theſe grounds* ſtamps a venerable character on the proceedings of the Houſe, whoſe cenſure becomes a load ſufficient to ſink any candidate. That this cenſure is leſs weighty *now* than it was formerly, is undoubtedly true.

The cauſe of this unhappy change ought to be diſcovered. Some impute it to the levity and wantonneſs of the common people, to their love of riot, to the want of ſubordination, and to the leveling ſpirit which is now ſaid to be ſo high among them. Others ſay, and I am afraid with truth, that the common people do but look up to the great, and follow their example; that, accuſtomed to ſee themſelves *bought in one market*, they naturally enough are inclined to think themſelves *ſold in another*; that they have no occaſion to level the great, who ſufficiently *lower themſelves*, by the conſtant gratification of the ſame ſordid paſſions, which they firſt raiſe in others, and then condemn.

Mr. Walpole's caſe, 1711. Expelled and re-elected.

In the next place, the caſe of Mr. Walpole, in 1711, is much inſiſted on. He was expelled, and then re-elected. And, 6 March, the Houſe reſolved, that, having been expelled *for the crimes there mentioned*, he *was* and is incapable of being a Member to ſerve in that Parliament. This is ſaid to be an adjudged caſe in point, and the law was declared *then* as it has lately been in Mr. Wilkes's caſe.

This unhappy precedent has been one cauſe of all our troubles. A ſearcher for precedents is too apt to content himſelf with *any caſe*, if it does but anſwer his preſent purpoſe in part of its circumſtances, and to overlook thoſe which make againſt it. Let us therefore conſider how far this precedent applies to the queſtion now before us.

In the firſt place, without admitting the declaration of the Houſe in Mr. Walpole's caſe to have been legal, I ſay that it is not at all ſimilar to that which was made in Mr. Wilkes's. The firſt was a *particular* declaration, that a Member for offences *there mentioned*, and *impriſoned* for them, was and is incapable of being re-elected into that Parliament. The other is *general*, and is the firſt inſtance of a declaration of incapacity reaching *all Members* expelled for *any offence*, or for *any cauſe*, and without any *other collateral circumſtances* whatever. When a modern proceeding is to *acquire its authority* from a precedent ſet in former times, that precedent ought to be exactly in point.

In the next place, are we to take Mr. Walpole's caſe as one in which it has been adjudged, that an expulſion implies an incapacity? If we are, we ſhall have the misfortune of being abandoned juſt where we ſtand moſt in need of it. For, unleſs it went much further, and brought into the Houſe *the ſecond on the poll*, as duly elected, and having a right to ſit, it will not anſwer our purpoſe.

Unluckily,

Unluckily, and as if this precedent, when fully opened and underſtood, was deſtined to condemn our modern proceedings, the petitioners made *this, their claim*, but failed in it. They alledged, that Mr. Taylor, the *opponent* of Mr. Walpole, and *next on the poll*, was elected; but that the Mayor had returned Mr. Walpole, *though expelled*. The whole matter was before the Houſe; and the claim of the petitioners hung upon this chain: Mr. Walpole was expelled in this Parliament; therefore he was incapable of being elected; therefore Mr. Taylor was duly elected, and ought to ſit. If it had at that time been underſtood to be *law*, that incapacity neceſſarily followed the expulſion, the conſequences would have been fair from the firſt, and the claim of the petitioners would have been good; that the majority, voting for a man incapable *by law* of being elected, threw away their votes, and the ſecond on the poll ought to ſit. The Houſe, therefore, could not have been ſo *unjuſt* to Mr. Taylor, as to iſſue a new writ: he *muſt* have been declared duly elected.

No tenderneſs of the Houſe, no relaxation of its rigour towards the electors, could have induced it to deal ſo *unjuſtly* by Mr. Taylor. That clemency is *criminal*, which, in tenderneſs to one ſet of men, deals unjuſtly by another. If the *law was* as the Houſe *declared* it, the ſeat in the Houſe was the right of Mr. Taylor. The law of the land, *that part of it* upon which the writers in ſupport of the late deciſion lay the greateſt ſtreſs, the *law of Parliament*, gave it him. The concluſion drawn in his favour was ſuch as the Houſe was *bound* not to trifle with; for it gave him the *ſame right* to his ſeat, as they had *to ſit in theirs*, and judge upon his election.

Beſides, we know from the hiſtory of the time which way the good wiſhes of the Houſe inclined. The opponent of Mr. Walpole would have been an acceptable man to the majority, if it had been poſſible, *by any means*, to have brought him within the bar. His being left in the lobby, turns this precedent into one of thoſe by which we learn what a *ſupreme* court, acting without control, *cannot do*.

It is ridiculous to hear it argued, that, though the incapacity was *legal*, it was not *known* till after the declaration made by the Houſe. The writ for the new election publiſhed all that was wanting to be *made known* to the electors; the expulſion of Mr. Walpole. If the conſequential incapacity was *legal*, the electors are *preſumed* and are *bound* to know it. Their anceſtors muſt have known it *from the earlieſt times*. Thoſe who voted for Mr. Taylor alledged, that they *did know it*, and made their claim upon it. Were they to loſe the *benefit of the law* upon the *ſuppoſed* ignorance of the other ſide? He that confeſſes it was not known, muſt confeſs alſo, that it derived its being, not from the *law of the land*, but from the *declaration* of the Houſe of Commons.

I will

I will close what I have to say on this head with an extract from a pamphlet lately published on the other side. The Author of the Answer to the Question Stated maintains, "That it is the known and established "law of Parliament, that the expulsion of any Member of the House of "Commons creates in him an incapacity of being re-elected; that any "votes given to him at a subsequent election are, in consequence of such "incapacity, null and void; and that any other candidate, who, except "the person rendered incapable, has the greatest number of votes, ought "to be the sitting Member." Now the refusal of the House of Commons to vote Mr. Taylor duly elected is a direct denial of one or more of the propositions contained in this doctrine. Whether *all these propositions* were denied, or *only one of them*, is a matter of perfect indifference to the present question. For the denial of *any one of them* destroys the chain, condemns the doctrine, and renders Mr. Walpole's case no precedent for Mr. Wilkes's.

It hurts one; it tends to impress the most unfavourable opinion of the human heart, when we see a gross misapplication of those talents which might have been directed to the good of mankind. This same author, in the very next page, hunts after excuses, and labours in vain to reconcile the judgment of the House upon the right of Mr. Taylor, with the declaration made of the incapacity of Mr. Walpole. He tells us, "that the "*legal* meaning of the word *expulsion* was not *precisely* fixed; that the "House *thought proper to fix it*, and explicitly to declare the full conse-"quences of its former vote, before they suffered those consequences to "take effect." Where then was this *known and established* law of Parliament? or how shall we fix these inconsistent reasonings of this author, these conclusions which fight with and destroy each other?

It follows, therefore, from the act of the House in issuing a new writ, instead of admitting Mr. Taylor, that the House was not satisfied in the *legality* of that consequence which it pretended to declare; and that it abhorred the thought of giving effect to that declaration, by establishing as sitting Member Mr. Taylor, who had a confessed minority on the poll. The precedent, far from being a ground for the late proceedings, condemns them absolutely; and forces upon us a disagreeable comparison of the moderation of those times with the intemperance of these we live in.

But, if this precedent had been well and compleatly applicable to the present case, still it is but *one* precedent, arising in a *suspicious* time, upon a *tottering* administration, in a *new* Parliament holding a *different language*, and pursuing a *different system*, from that which went before it. The precedent itself was *new*, the *first* declaration of its kind, and the sufferer under it was *one of the first men* of an *obnoxious*, *vanquished* party. These

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are conſiderations which might reaſonably induce us to look to that precedent with an uncommon degree of diffidence.

We all know, that this proceeding againſt Mr. Walpole was thought by many perſons a hard and unjuſtifiable meaſure. Their objections were, that, inſtead of being a declaration of the law, it was a ſecond puniſhment for the ſame offence. I can eaſily conceive, that it was better defended at that time, than it has been lately by the author of the Serious Conſiderations. He maintains it to be a declaration of the law, and p. 32. "rejects all conſequences from the act of any court, which are directly "oppoſite to, and contradict the words of that court, in pronouncing the "judgment. He tells us, that whatever deductions may be *logically* made "from that proceeding, the *fact* is, that the Houſe of Commons, in *expreſs* "*words*, declared, that Mr. Walpole not only is now, but *was* at the "time of the election, incapable." If inſerting the word *was* into a reſolution will make it *declaratory*, and give it full effect as the act of a court *competent* to declare the law, and bind the ſubject by ſuch declaration, the Lord have mercy upon us! there is an end of the *law of the land:* the Houſe of Commons, in matters of election and privilege, and in the conduct of its own Members, and the other ſupreme courts in their ſeveral juriſdictions, are all of them maſters of their own language, and can word their reſolutions ſo as to declare the law as they may be inclined to make it. But if, on the other hand, we are at liberty to diſpute the *legality* of ſuch declarations, I do not ſee why we may not draw arguments in this caſe, as well as in any other, from the inconſiſtency of the proceedings, in its various parts, claſhing with and contradicting each other?

I have never heard but of one precedent, brought at that time to juſtify and ſupport the declaration of Mr. Walpole's incapacity. That was the caſe of Mr. Sloane of Thetford. Mr. Sloane's Caſe at Thetford.

26 Jan. 1699, upon hearing a petition againſt him, complaining of an undue election and return, he was adjudged to have acted in breach of the *late act of Parliament*, 7 *W.* III. *c.* 4. for preventing expences in elections, and therefore not duly elected. The election was declared void: a new writ iſſued; and he was re-elected.

19 Feb. the Houſe reſolved to conſider that act, and ordered Mr. Sloane to attend in his place.

21 Feb. Mr. Soame's petition was preſented, ſetting forth the former proceedings againſt Mr. Sloane, and his being *again* returned, to the prejudice of the petitioner, who was duly elected, Mr. Sloane being *incapacitated.* This petition is ordered to lie on the table till the act ſhall be conſidered.

2 March, the Houſe having read the act, reſolved, that Mr. Sloane was *incapable* of ſerving in *that Parliament* for *that borough.* The petition

of Mr. Soame was *referred* to the committee: but no report appears to have been made upon it.

This precedent appears pretty obviouſly inapplicable, both to Mr. Walpole's caſe and Mr. Wilkes's. For Mr. Sloane's caſe differed eſſentially from theirs, in many inſtances.

Firſt, Mr. Sloane had been adjudged *not duly elected*, and his election had been declared void: but he had *not been expelled*. The queſtion before us being upon the conſequences of an expulſion, if he was not expelled, no circumſtances in his caſe, even if they were more ſimilar than they are, can be applied *to that* queſtion.

Secondly, the reſolution in his caſe differs, in all its circumſtances, from that which was taken in theirs. In his, it is a *particular reſtraint*, grounded upon *an act of Parliament*, in a *particular caſe* there provided for, and limited to *one borough*. In theirs, it is a general declaration of incapacity, as the neceſſary *conſequence* of an expulſion upon the *cuſtom* or *common law* of Parliament, extending to every place in the kingdom.

Thirdly, ſo far as it affected Mr. Sloane, it was an illegal judgment; and therefore not fit to be applied to any caſe whatever. For, though it was grounded upon a particular act of Parliament, it carried the penalty far beyond the limits preſcribed by that act. *There*, in expreſs words, the incapacity of ſitting is confined to that election at which the corrupt practices have been made uſe of: but the Houſe extended it to *all elections* which might happen at that place, during the continuance of that Parliament.

Laſtly, I cannot but obſerve, that, if this precedent had been applicable to Mr. Walpole's caſe, it was not ſo to Mr. Wilkes: for, after the declaration of Mr. Sloane's incapacity, Mr. Soame was left in the lobby *to wait for Mr. Taylor*, inſtead of *accompanying Mr. Lutterell* into the Houſe of Commons.

Mr. Walpole quoted two precedents in his favour; Sir Robert Sawyer's caſe, and Mr. Woolaſton's; who, he ſaid, had both of them been expelled, and were re-elected. It has been ſince found, that the interval of time between Sir Robert Sawyer's expulſion and the diſſolution of the Parliament was too ſhort to admit his re-election. I ſhall therefore throw his caſe out of the queſtion. But Mr. Woolaſton's was ſtrong in favour of Mr. Walpole; and proves, beyond a doubt, that the Houſe of Commons was not then of opinion, that expelled Members were inrapable of being elected.

Mr. Woolaſton's Caſe. Caſes of Malden and Bedford.

20 Feb. 1698, Mr. Woolaſton was *expelled*, for having acted as a receiver of the duties on houſes and windows, while he was a Member of the Houſe of Commons, contrary to the expreſs proviſions of the act

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5 & 6 W. & M. He was afterwards re-elected, and ſate in the ſame Parliament.

It has been argued, that there was an inaccuracy in the language; that, though Mr. Woolaſton was directed to be expelled, he was not conſidered as a criminal; that he was only under a temporary incapacity, as holding an office not tenable with a ſeat in parliament; and became well qualified afterwards, by the ſurrender of that office. *Then*, the very thing is *taken for granted*, which ought to be *proved*; and the admiſſion of Mr. Woolaſton, after his re-election, is to paſs as proof; not that the Houſe was *bound* to receive, but that the Houſe did not conſider him as guilty of an offence. But, I inſiſt, that there was no inaccuracy in the language; that Mr. Woolaſton was conſidered as an offender, and for that reaſon expelled. Serious Conſiderations, p. 23.

The act *forbids* any Member to accept the office. I have no idea of criminality, of an offence againſt law, if that man is not a criminal who acts in direct contradiction to an act of Parliament. Whatever objection might be made to treating as offenders thoſe who mean to vacate their ſeats by the acceptance of the office, there can be no doubt, that to accept, or continue to hold, the office, and at the ſame time ſit as a Member of the Houſe of Commons, is an offence contrary to the expreſs words and manifeſt intention of that act. Mr. Woolaſton did this, and therefore his expulſion muſt have been inflicted for puniſhment.

Mr. Woolaſton ſurrendered the office. He was *then* re-elected and admitted to ſit. But this ſurrender, timely as it may be thought by ſome, was ſurely much too late, and could not take off the crime *already committed*, by preſuming to act as the officer while he continued a Member. It was equally inſufficient to take off the conſequences of the puniſhment inflicted for that crime. And if incapacity had been one of thoſe conſequences, the Houſe itſelf could not have releaſed it; Mr. Woolaſton could not have been admitted to his ſeat.

Therefore, from the *common ſenſe* and *meaning* of the words; from this known truth, that the *leſs* cannot include the *greater*; from the *language*, in which the ſeveral puniſhments of expulſion and diſability have been inflicted, marking very diſtinctly the intention of the Houſe, whether it was to *confine* the puniſhment to expulſion, or *extend* it to diſability; from *Mr. Woolaſton's* being admitted to ſit after his expulſion; and from *Mr. Taylor's* not being admitted upon his conteſt with Mr. Walpole; it appears clearly, that our anceſtors did not underſtand the ſame thing by thoſe very different words, nor were ever *really* of opinion that an incapacity was the neceſſary and implied conſequence of an expulſion. Still leſs did they hold, that, where the firſt on the poll had been expelled, his

incapacity was *legal*, and the ſecond on the poll ought to be admitted to ſit as duly elected.

Caſes of Malden and Bedford.

The caſes of Malden and Bedford have been much relied on. In 1715, Serjeant Comyns having refuſed to take the oath of qualification required *by act of Parliament*, at his election for Malden, his election was declared void; and the petitioner, who was next on the poll, adjudged duly elected. In 1727, Mr. Ongley petitioned for Bedford, and had the majority on the poll: but, it appearing that he had an office in the cuſtoms, which *by act of Parliament* rendered him incapable of being elected, the Houſe reſolved, that he was incapable of claiming to ſit in Parliament. It is a matter of perfect indifference to me, whether theſe precedents are quoted as authorities for rendering Mr. Wilkes incapable, or as proofs that, upon the ſuppoſition of Mr. Wilkes's *legal* incapacity, the law of Parliament was, that his competitor, Mr. Lutterell, was duly elected: for, in my opinion, they can be applied to neither. This I am ſure of, that a proceeding juſtifiable upon the ground of a *legal* incapacity, is no good precedent for the *like proceeding* in a caſe where the incapacity is *not legal*. The diſqualifications of Mr. Comyns and Mr. Ongley were *recent*, but they were moſt ſtrictly legal; created by *an act of Parliament*, and therefore *ſuppoſed* known to the electors, and binding to them. Mr. Wilkes's diſqualification was *alſo recent*; but it was ſupported by *no cuſtom*, nor by any *ſtatute*; deriving its authority from a reſolution of the Houſe of Commons *only*, and that reſolution taken *extrajudicially*, without hearing the parties. The electors therefore were not *ſuppoſed* to know it, nor *bound* to acknowledge its authority.

Anſwer to the Queſtion Stated, p. 14.

Mr Wilkes's Caſe not one of thoſe in which Conviction in the King's Courts works an Incapacity of holding Offices of Truſt.

The caſe in which the conſequence ſet up would be beſt ſupported is, where a Member has been expelled for any of thoſe crimes, the puniſhment of which, in any of the King's criminal courts, would be incapacity of holding any office, civil or military. For it might ſeem ſtrange, that a man, who, by his conviction in the King's criminal courts, is rendered incapable of undertaking the moſt trifling publick truſt, ſhould, after conviction in the Houſe of Commons, be admitted to act in the moſt important truſt, a repreſentative in Parliament. The argument from analogy in this caſe, and the reaſonableneſs of the objection, would have great weight. But, on the other hand, *even in this caſe*, the danger of *innovation*, in a very *tender* part of the conſtitution, would be very ſenſibly felt, and check the progreſs. Without, therefore, determining this point, it is ſufficient to obſerve, that, even if this caſe were determined in favour of the doctrine ſet up, it would do no ſervice in Mr. Wilkes's caſe: for they greatly differ. His crimes are not ſuch as, upon conviction, any-where render him incapable of holding any office of truſt whatever. He might even become one of the firſt officers of ſtate, if the Miniſtry ſhould lay aſide

aſide their recent diſpoſition to perſecution, re-aſſume their former good-humour and partiality towards Mr. Wilkes, and think proper to re-admit him into their corps.

It appears therefore, that the effect of an expulſion is to be, what the common ſenſe and meaning of the word imports, an expulſion, not a diſability. The cauſes of the expulſion may be ſuch as render the Member *ineligible by law*; ſome of thoſe which I have already mentioned, as the only diſqualifications known in our common or ſtatute-law. In that caſe, the diſqualification does not follow as the natural and neceſſary conſequence of the expulſion: the Member is not diſabled, *becauſe* he is expelled; but he is *expelled*, becauſe he is incapable of ſitting. If the Houſe intends to go further, why does it not ſay ſo, and diſable *if it can?* It is not to be preſumed, that it would chuſe to make uſe of an expreſſion which, neither in parliamentary language, nor in any other, conveys its meaning; and inflicting puniſhment, to *one degree only*, by the *words* of the ſentence, cannnot be underſtood to inflict it to a *much greater degree* by *implication* and *inference*.

CHAP. VII.

Other Arguments for the Incapacity of Mr. Wilkes conſidered—that he might have been ſentenced to the Pillory—that he was a Priſoner in Execution—that the Judgment of the Houſe is the Law of the Land.—Obſervations on thoſe Parts of the Serious Conſiderations *which derive the Authority of Parliamentary Diſabilities from the Reſolutions of the Houſe only—and on thoſe Parts of the* Anſwer to the Queſtion Stated *which maintain a Power in the Houſe to declare the Law differently at different Times.*

Other Arguments for the Incapacity of Mr. Wilkes conſidered.

IT may be proper here to take notice of ſome arguments which are out of the common line; and, abandoning the ground taken by the Houſe of Commons, ſtart freſh objections to Mr. Wilkes's capacity of being elected.

It has been urged, that his crimes were of that nature, for which he *might* have been ſentenced to the pillory; and that, by ſuch ſentence, he *would* have been infamous, and *could not* have been received as a juror or witneſs, and conſequently *ought not* to be admitted as a Member of Parliament. The anſwer to this argument is very eaſy. Without entering into the conſideration of the *ſuppoſed conſequence* of a puniſhment which was *not* ordered, I will ſtop at the Fact. The court of King's-bench

did

did not ſentence Mr. Wilkes to the pillory. Lord Coke adviſes the Juſtices
3 Inſt. 219. of the peace, "for that the judgment of the pillory doth make the delin-
"quent infamous, they ſhould be well adviſed before they give it. Fine
"and impriſonment, for offences fineable by them, is a fair and ſure way."
The Court of King's-bench has been thus cautious. It has not ſentenced
Mr. Wilkes to the pillory. The fine is perhaps higher: and the impriſon-
ment longer, on account of the puniſhment of the pillory being omitted.
Thoſe who uſe this argument have ſo little of the caution recommended
by Lord Coke, and indeed ſo little humanity, as to wiſh to add all the con-
ſequences of that puniſhment which the Court of King's-bench, perhaps
on account of thoſe conſequences, did not think proper to inflict.

P. 16. The author of the Serious Conſiderations has given us another ſpecies of
Obſervations on the Parts of the Serious Conſiderations which deri've the Authority of Parliamentary Diſabilities from the Reſolutions of the Houſe only. P. 29. diſability, which had eſcaped the enquiries of all the learned men who went before him. He tells us, that perſons *in execution at the time of their election* are ineligible by the the *reſolutions* of the Houſe of Commons: and he quotes Sir Thomas Monke's caſe, 24 March 1625. The author of the Caſe Conſidered, aſſerts the ſame ineligibility, quotes another caſe, Mr. Coningſby's, 22 March 1661, and in a note gives us a reaſon for it, "becauſe, being in execution, he is not bailable, and therefore *cannot* "attend."

Theſe writers appear to have had different deſigns. One, avowedly to veſt in the Houſe of Commons a power of giving the law by *its own reſolutions only:* the other, to lay before us *another ground* on which Mr. Wilkes was ineligible. To the firſt, I ſhall have ſomething to ſay hereafter: my attention is drawn by the plan of this enquiry to the latter at preſent, who, conſcious that *two caſes* will not prove a *cuſtom*, more modeſtly offers a reaſon in ſupport of the doctrine he contends for. This reaſon, *obvious* as he thinks it, has occurred to no writer before him. I know not whether I am to ſay, that it *eſcaped* the vigilance of the Houſe of Commons, or that it was *rejected* by them. It certainly *offered* itſelf to the conſideration of the Houſe in the much debated precedent of Mr. Walpole, whoſe impriſonment was made one of the grounds for the declaration of his incapacity; but it was *not now accepted*. The declaration of Mr. Wilkes's incapacity reſts *ſingly* on his expulſion.

I will now conſider this new ſpecies of ineligibility on the fair footing on which the author of the Caſe Conſidered has been pleaſed to put it, its reaſonableneſs, and particularly on that ground of reaſon which he thinks ſo obvious.

Men may be in execution either on civil or criminal ſuits. In the firſt caſe, is the author ſure that the member would not be entitled to *priviledge of perſon?* I ſee the hardſhip, and lament as much as any man, that there is *ſo little* priviledge againſt the Crown and *ſo much* againſt the ſubject:

but I am yet to learn that the hardſhip is greater in this caſe, than in any other, where the plaintiff is barred by priviledge of Parliament from ſuing the defendant to execution on his perſon.

In the next place, if there is no ſuch priviledge, how does the reaſon given, "that the Member is unable to attend," hold in this caſe more than in that of perſons employed abroad in the King's ſervice, as Embaſſadors and Commanders of his forces. The one is at all times a very honourable cauſe of abſence; the other is in many inſtances, but certainly not in all, a ſhameful one. But there is *the ſame incapacity* of attendance in *both caſes*. It is alſo *temporary in both*; but with this very conſiderable difference. The priſoner in execution on a civil ſuit, has it ſo far in his power to put an end to *his incapacity* that it depends on *himſelf alone*. He may pay his debt, and attend in his place. The King's Officer cannot put an end to *his incapacity*, without the *conſent* of the Crown. Embaſſadors and Commanders of the King's forces cannot deſert their poſts. The Crown therefore *can debar* the people of their Repreſentatives, in the caſe I have mentioned, as long as it pleaſes: but the plaintiff *muſt accept* payment of the debt, whenever it is tendered to him,

Let me ſuppoſe this done, the Member who was lately in execution for debt releaſed from his impriſonment, and attending in his place the firſt day of the ſeſſion. He has voted for the Speaker, taken the oaths, and delivered in his qualification. Our author, if in Parliament, takes the objection. He is *too fair* to reſt upon precedent: he *condeſcends* to reaſon. He argues againſt continuing this gentleman a Member becauſe, as he was ineligible at the time of his election, his election muſt be void. This concluſion cannot be denied: and the only difficulty remaining with our author is to prove the ineligibility at the time of the election. He proves it thus; he was at that time in execution for debt, and *therefore* incapable of attending. Though the Member ſhould get up in his place, and ſay *here I am*; our author doubtleſs expects that his argument ſhould hold good, that the Houſe ſhould *have eyes but ſee not*, *ears but hear not*, and very *gravely* reſolve, that the Member who has ſpoke in his place *is not* there, and *cannot* be there, and declare his election void becauſe of the *impoſſibility* of his attendance.

This I think is deciſive againſt the reaſon given by the author, in a caſe where the priſoner is in execution *for debt*. It is equally ſo *in ſome caſes* where the impriſonment is on a criminal proſecution. It will be proper juſt to ſtate them, becauſe the aſſertion is general, and extends to *all priſoners in execution*. Suppoſe the term of the impriſonment ſo near expiring that the priſoner would be at liberty before the return of the writ; or that he is to continue in priſon only till ſecurity for the good behaviour is given, or a fine paid. It is clear that in all theſe caſes the incapacity of attending

may

may be compleatly removed by the perſonal appearance of the Member: and conſequently, that if *all priſoners* in execution on a criminal proſecution are ineligible, it muſt be for ſome better reaſon than that which is now before us.

Here I might leave this matter till I come to the other writer, who roundly aſſerts the reſolution of the Houſe *ſufficient* to create this or any other ſpecies of diſability whatever. But when I ſee a writer attempting to increaſe the number of incapacities, adding to the liſts in our law-books, departing from *their authority* upon *ſpeculation* and what he thinks *reaſonable ground*, I muſt follow him a little into the conſequences of his doctrine, that, while he looks on one ſide to the dignity of the Houſe of Commons, he may not ſplit on an infinite ſhoal of rocks which lie on the other ſide, not the leſs dangerous for being a little under water. Does he mean to ſay, that by the law of Parliament, in which no grace and favour can intervene, if any man, upon a malicious proſecution, is convicted of any of thoſe offences of which impriſonment is the ordinary puniſhment, he ſhall *therefore* be incapable of being elected into Parliament? that, upon the ſame principle, if a Member is impriſoned for any ſuch offence, he ſhall be expelled? and, if expelled, he ſhall be incapable of being re-elected into that Parliament? I need not ſuppoſe that proſecution a trick of ſtate, a deviſe of the Miniſter to get rid of an enemy; becauſe the reader goes before me, and ſees a thouſand tricks and devices of that ſort. But has the author conſidered, how *likely* it is to ariſe upon a competition of intereſt in every place in which there may be a conteſt? has he well weighed the *temptation* it ſuggeſts to a rival in the heat of an election, or to one who after that election has been decided againſt him, is to reap the benefit, not only of the *vacancy* created by the impriſonment and expulſion of the Member, but of the *incapacity* of that man who at the preceding conteſt had been found to have the moſt powerful intereſt?

Has he conſidered the *offences* for which the courts of law may inflict impriſonment? Whoſe conduct in life has been ſo perfectly pure and chaſte as to bear the ſtrict inquiſition ſuggeſted by the worſt of paſſions? Let him reflect that few of thoſe offences are cognizable *only* in the King's ſuperior courts; they are open to the juriſdiction of Juſtices of the peace in their ſeveral counties and corporations. I will inſtance only one caſe. To hold up a cane in anger, where the moſt provoking but artful inſolence and the moſt inſidious malice have united, at the ſame time to *inſult* and to *inſnare*, is in the eye of the law an aſſault: and the court where the offence is tried *may impriſon* upon conviction.

If I found this the eſtabliſhed *cuſtom* of Parliament, I ſhould admit *that cuſtom* to be *a law*, and ſhould not be either ſo trifling or ſo preſumptuous as to diſpute againſt it. But as it ſtands only on one or two caſes, I deny

I deny their authority ſufficient to make a cuſtom. In this reſpect this writer and I do not ſeem to differ: for he attempts to juſtify the doctrine upon the reaſonableneſs of it. But, till I hear more caſes in point, ſo as to be borne down by their number; or a much better reaſon than what has been aſſigned by this writer; I ſhall conclude, that being a priſoner in execution does not render a man ineligible to Parliament.

I muſt obſerve, however, that if this doctrine were good, and impriſonment in execution were a *legal ground* of incapacity, ſtill it would not follow, that Mr. Wilkes was *therefore* ineligible. For the Houſe did not think proper to go upon that ground. The impriſonment is one ground of the expulſion: but the expulſion is the only ground of incapacity *declared* by the Houſe of Commons, and *made known* to the electors; and cannot be helped out by the impriſonment, which the Houſe of Commons did not publiſh to them. Upon the argument, therefore, of all the writers on that ſide of the queſtion, who contend that the writ publiſhed the incapacity of Mr. Wilkes; *this cauſe* of ineligibility, *not being made known* by that writ, could not operate ſo as to render void and thrown away the votes tendered for Mr. Wilkes, and to eſtabliſh Mr. Lutterell the *lawful Member* for the county of Middleſex.

It was found neceſſary, very early in the diſputes on this matter, to lay it down, that the deciſion of the Houſe of Commons was ſtrictly *legal*, becauſe it was a declaration of the *law* by a *ſupreme court*, from whence there lies no appeal, in a matter *competent* to the juriſdiction of that court. The ſame thing might be ſaid, *with equal weight*, if the Lords, in their ſupreme and uncontrolable judicature, were now to declare, that the eldeſt ſon is not his father's heir. The ſame anſwer might be given to both; and the right diſtinctions taken between *making* the law and *declaring* it, aſſuming thoſe powers which are not given *under pretence* of exerciſing thoſe which are. The fallacy of this doctrine is eaſily detected. The *expoſition* of the law by any court in a caſe competent to its juriſdiction, be it good or bad, muſt have the *force* and *effect* of law, *ſo far* as to be binding on all perſons concerned, and will continue in force till corrected by ſome ſuperior power. But, whether that expoſition was juſt or unjuſt, whether it was according to law or contrary to it, whether it ought to ſtand good or be corrected, are queſtions open to our diſcuſſion, and fit to be freely canvaſſed without prejudice from the judgment already given.

The writers in ſupport of that deciſion are well diſciplined, take the word of command very readily, and follow their leader where-ever he thinks proper to march them. It is the *favourite point* with the author of the Serious Conſiderations, and what he moſt labours, that all incapacities ſhall *derive their authority* from the reſolutions of the Houſe of Commons. With this view, the caſe of Sir Thomas Monke is not

P. 16. quoted by him any otherwiſe than as a *precedent* of one deſcription of men, among others, diſabled *by reſolutions* of the Houſe of Commons. This writer will be found to ſtand very *forward* in this line; others have been *modeſt*, and *rather ſhy* than otherwiſe; but none have *dared* to give up this ground. The gallant author of the Anſwer to the Queſtion Stated outſteps them all, and bravely avows, that the law of election may be *varied from time to time* by the *reſolutions* of the Houſe of Commons. It will be proper to attend theſe writers a little in the examination of this doctrine, which, if found and good, not only warrants the declaration of the law in Mr. Wilkes's caſe, but precludes us from examining that or any other declaration made, or to be made hereafter, in any other caſe.

If the people were not uneaſy enough already, one would almoſt think that the deſign of theſe writers was to excite alarms, inſtead of quieting them. For, every extravagant *exertion of power* that can be found in the hiſtory of former Parliaments, every thing that can excite *terror*, or move *contempt*, is laid before the publick, with an avowal, that, *becauſe it has been done* by the Houſe of Commons, it is *therefore the law of the land.*

All our law-books agree, that a minor is ineligible at common-law: but that law which binds our other courts of juſtice could not bind the
P. 10. Houſe of Commons. The author of the Serious Conſiderations tells us, that, before the act 7 & 8 W. III. the contrary practice *univerſally* took place; and quotes an inſtance of a minor, admitted to be ſuch by his counſel, declared duly elected, 16 Dec. 1690. Now, the incapacity was juſt the ſame *before* the ſtatute 7 & 8 W. III. as it was after it. That ſtatute does but *affirm* the common-law, and enforce it by a penalty on the minor, if he preſume to ſit. But the concluſion of this writer ſets the Houſe of Commons free from the ſhackles of the common-law; and tells us, "that diſabilities *by the common-law* do not always act as ſuch *by* "*the law of Parliament*; and of this difference the Houſe of Commons "are *the ſole judges.*"

In the caſe juſt quoted, the Houſe *diſpenſed* with a diſability which exiſted by the common-law: in another, it *created* one without any law
P. 29. to ſupport it. And this caſe is quoted by the ſame writer, with the ſame view, that qualifications and incapacities may depend upon the reſolutions of the Houſe. The diſability of popiſh recuſant convicts could not exiſt by common-law; for the offence itſelf is created by ſtatute. There could therefore be no ſuch diſability till enacted by Parliament. But, before any act paſſed for this purpoſe, the Houſe diſabled Sir Thomas Strickland, a perſon convicted of popiſh recuſancy, *by its reſolution*, 6 Mar. 1676. By the act 3 Jac. popiſh recuſant convicts were ſubjected to many diſabilities; but were left capable of ſerving in Parliament. This might be thought a ſtrange deficiency in that act; and, in 1676, the Houſe preſumed to

ſupply

ſupply it by its own reſolution, diſabling Sir Thomas Strickland. But, in the very next year, the Legiſlature would not permit the diſability of popiſh recuſant convicts to reſt on the authority of that reſolution; but paſſed an act for that purpoſe.

Upon the ſame principle, and with the ſame deſign, this writer tells us, that the bar to the admiſſion of the clergy into the Houſe of Commons, is three reſolutions taken, 13 Oct. 1553, 7 Feb. 1620, and 9 Jan. 1661, that exact number which has been found to be no bar to the admiſſion of the Attorney-General. He has his fears, that, if we do not acquieſce under the authority of the Houſe, in the extent in which he means to maintain it, "Mr. Horne, and many other peaceable and reverend di-"vines, may be admitted Members in this, or ſome future Parliament." I may be permitted alſo to have *my fears*, that, if we do admit it in that extent, Mr. De Grey may be obliged to walk out of the Houſe, and no future Attorney-General permitted to ſit in it.

Eager to maintain this authority of the Houſe, he riſques the conſequences of proving too much, and relies on inconſiſtent and contradictory judgments; Sir George Selby, Sheriff for Durham, not permitted to ſit for the County of Northumberland; Sir Edward Coke, in the ſame circumſtances, continued a Member; the famous excluſion of the Attorney-General contradicted by the conſtant practice, and every day's experience, in our own times. He reſts the diſability of outlaws on the reſolutions of the Houſe; though he muſt know, that other reſolutions may be brought of their being admitted, not only to their ſeat, but to their privilege. Of this, the caſe of Mr. Fitzherbert is a famous inſtance; and there are ſeveral others. Theſe have not the appearance of communications from a friendly quarter. The author ſeems to undermine the cauſe which he pretends to ſupport, and impreſſes more ſtrongly than ever the neceſſity of confining, within the *ſtrict rules of law*, a judicature which has been thus abuſed.

P. 13.

P. 17.

P. 17.

The author of the Anſwer to the Queſtion Stated, anxious to maintain the ſame doctrine, and reſt the authority of all parliamentary diſabilities upon the reſolutions of the Houſe, has a ſovereign cure for all theſe inconſiſtencies, and a *rule of Parliament* well adapted to the removal of thoſe difficulties apt to ariſe in ſqueamiſh minds, upon the view of ſo many contradictory judgments. At Lynn, though Mr. Walpole was, upon no ground either of common or ſtatute-law, declared incapable, Mr. Taylor was not declared duly elected; it was a void election. At Malden, Mr. Comyns, the returned Member, being found under a known legal incapacity, the petitioner was adjudged duly elected. At Bedford, Mr. Ongley, the petitioner, being under a known legal incapacity, it was reſolved, that he was incapable of claiming to ſit in Parliament. The difference of the

Obſervations on thoſe Parts of the Anſwer to the Queſtion Stated which maintain a Power in the Houſe to declare the Law differently at different Times.

concluſion in the two laſt from the concluſion in the firſt, ought to be imputed to the *difference* in the incapacities ſet up in thoſe caſes as the ground of all the ſubſequent proceedings. But this will not anſwer this writer's purpoſe; for he wiſhes to maintain that, though the incapacity were *equally legal* in all theſe caſes, the different concluſion might be
P. 58. *equally legal alſo.* For this purpoſe, he tells us, "that if the law of expul-
" ſion had been as clear to the burgeſſes of Lynn as it was to the free-
" holders of Middleſex, it will only prove that the law of election, *at that*
" *time*, was different from the *preſent law*; and that, in all caſes of an
" incapable candidate returned, the law *then* was, that the whole election
" ſhould be void. But *now* we know, that *this is not the law.* The
" caſes of Malden and Bedford were determined on other and more juſt
" principles, and are admitted on all ſides to be law."

I am ſure, that I do not mean to controvert the legality of the judgments given in thoſe two caſes. The objection of a *legal incapacity* was entitled to an anſwer very different from that which was given upon the petition from Lynn. But I mean to mark the profligacy of the doctrine, " that the deciſions of the Houſe of Commons can render the law of " election *at one time*, different from the law of election *at another.*" I am ſorry to confeſs, that the fluctuating and inconſiſtent judgments given by the Houſe of Commons, at different times, give too much encouragement to the admiſſion of this doctrine. But I deny, let the conſequence be what it will, and the imputation fall where it may, *that the law of election can be varied, except by Act of Parliament.* This writer contends that they may, by the reſolution of the Houſe of Commons only. And thus every thing, reaſon, precedent, juſtice, law, are to be reſolved into the *authority* of the Houſe, which can, by its own reſolution, *make* and *unmake* the law at pleaſure, and *vary it from time to time* in ſuch manner as to give us, poor miſerable wretches, who are bound by it, a new code every twenty years. In Mr. Walpole's caſe, ſays this writer, his incapacity might *not give* a title to the ſecond on the poll. It was law *then*, but we know *that it is not law now.*

This, indeed, is the great object of all the writers in ſupport of the late diviſion. With this view, they perpetually tell us of the authority and ſupremacy of the Houſe; of its ſole and excluſive juriſdiction; of its power to declare the law in matters of election; of the efficacy and validity of its reſolutions. But this gentleman is the only writer who ſtands forth in broad day-light, contending for the power of the Houſe to declare the law differently in different times. Common courts are bound to take heed to their judgments, that they be conformable to reaſon, law, juſtice, and precedent. But, according to this writer, the *tranſcendent juriſdiction* of the Houſe of Commons can differ from itſelf as much and as often as it

pleaſes,

pleaſes, in the declaration of the *ſame law*, correcting itſelf only in its *ſtyle* and *manner*, and avoiding thoſe words which *by enacting* might give offence, and not be more effectual than thoſe *declaratory words*, which pronounce the law "*different at one time from the law at another.*"

CHAP. VIII.

Obſervations on the Precedents in the Serious Conſiderations---*on the Remarks made in the* Anſwer to the Queſtion Stated *on the Caſe of Sir Chriſtopher Pigott---Confeſſion in that Anſwer, that the Deciſion on the Return determined the Merits of the Election before the Petitioners were heard.---The Argument there, that the Power of repeatedly expelling, implies the Power of diſabling.---Caſe of Lyme Regis as ſtrong on one Side as many of the Precedents are on the other.---State of the Diſpute.*

Obſervations on the Precedents in the Serious Conſiderations.

IT will be proper now to conſider, what has been further offered by theſe writers in ſupport of their opinion, that an expulſion from the Houſe of Commons implies an incapacity of being re-elected. Never did any writer make a more ſhameful uſe of precedents, than the author of the *Serious Conſiderations*. I have already had too much occaſion to make that obſervation, and am now obliged to renew it. Even Arthur Hall's caſe P. 26. is a good precedent with him: and if the Houſe ſhould be pleaſed to exerciſe all the powers which are in the court of King's-bench, I do not think that this writer would ſcruple to bring Hall's caſe in ſupport of ſuch proceedings.

The intemperance of the times in which the precedents were ſet, *ſuggeſts not to him* any objection to their application. He therefore carries his ſtring of precedents to pretty late in the year 1642, till the King's ſtandard P. 28, and 29. was ſet up at Nottingham, "becauſe Pym, Hampden, Holles, Glyn, "names which will ever be revered by Engliſhmen, were then the moſt "active and leading Members of the Houſe of Commons." But can any one perſuade himſelf, that thoſe great men were, *at that time*, either diſpoſed, or able to check the Houſe, in any of thoſe ſtrong meaſures?

It is indifferent to this writer whether his precedent be the *act* of the Houſe, or the over-ruled ſenſe of a *minority*, or the opinion of a *particular Member*. Sir J. Leeds's caſe is therefore quoted as a good precedent, P. 26. meerly becauſe *ſome Members* entertained an opinion that he ought to be rendered incapable of ſitting in that Parliament; though, upon this writer's own ſtate of it, the Houſe was of the *ſounder opinion*, and refuſed to come into the motion made, that he might *ſit no more in that Parliament*.

Mr.

P. 30. Mr. Sackville's and Sir Robert Cann's caſes are plainly thoſe of *expelled* Members, not *diſabled*: and in vain would this writer infer a diſability in either of theſe caſes from any part of the proceedings, illuſtrated as they are by Mr. Gray's Debates. In thoſe Debates, Serjeant Maynard is ſaid to have adviſed, "that Mr. Sackville ſhould be put into ſuch a condition "that Oates and Bedlow might have remedy againſt him, and that is, by "expelling him." Our author *thinks* this a ſhort time for remedy, *unleſs* expulſion implied a diability, becauſe *he believes*, the borough Mr. Sackville ſerved for was pretty much at his command, and would have returned him again in forty-eight hours. Is not this a very extraordinary method of collecting the *law of Parliament?* It is *no act* of the Houſe, but the *opinion* of *one Member*. That opinion neither is nor could be *on record*; but is delivered to us in the very *incompleat*, though entertaining notes of Mr. Grey, and then helpt out by the *conjectures* of this writer on the ſtate of the intereſt at Eaſt Grinſtead and the diſpoſition of the electors there.

Sir Robert Cann was ordered to be *expelled*. The Speaker in pronouncing judgment ſays, "You are actually cut off from being a Member of "this Houſe, and you are *no more* to be a Member of Parliament." I do not admit this writer's *grammatical* conſtruction of theſe words: but I will not diſpute it. For it is enough in this caſe to ſay, that it was the *duty* of the Speaker in pronouncing judgment to *confine* himſelf to *thoſe words* in which he had received it. Whatever he has added, is *his own*. It may be the *comment* of Mr. Speaker: but it cannot be the *declared ſenſe of the* Houſe.

P. 31. I little expected to ſee Mr. Walpole brought up as an evidence in ſupport of the *legality* of the proceedings which were had againſt him. His acquieſcence and ſubmiſſion is in the opinion of this writer an admiſſion of their legality, and a confeſſion, "that if the burgeſſes of Lynn had "perſiſted to vote for him at any election, after the reſolution declaring his "incapacity, any other candidate, with any number of legal votes how-"ever few, muſt have been adjudged the ſitting Member." Neither this writer nor I ought to pretend to know Mr. Walpole's reaſons for acquieſcing under the reſolution of the Houſe, and inclining rather to get his friend and relation choſen, than to riſque the conſequences of his own ſecond re-election. I am however as much at liberty to have my conjectures, as that writer to have his: and *I ſuppoſe*, that Mr. Walpole was ſagacious enough to foreſee many conſequences to follow from his perſeverance, without admitting either their legality or their juſtice.

P. 29. On the Reſolution and Anſwer to the Queſtion. The writer of the Anſwer to the Queſtion Stated ſeems to think that he has a precedent of great authority in the order of the Houſe upon the diſmiſſion of Sir Chriſtopher Pagott, for a writ to be iſſued for a *new choice*, and

and in the Speaker's warrant for the choice of *another* Knight in his room and place. The attention of the reader is drawn to the words *new* and *another*, by printing them in Italics: and then the author goes on exultingly: "Such is the *clear language* of this record; it needs no comment, "and is inſtead of a thouſand precedents to eſtabliſh the full power con- "tended for." Now the true reaſon why the author *has not given us his comment* is, becauſe it was much ſafer to inſinuate in the *mode of printing* than to *reaſon* upon this matter. For there is nothing extraordinary in the word *new*; every choice *is new* that is made at a new election, though it fall upon the *ſame Member*: and the word *another* is the common term conſtantly uſed in every new writ upon every vacancy. If a Member accept a place tenable with a ſeat in Parliament, but whereby his preſent ſeat becomes vacant, the writ directs the election of *another* Member in his room. This word therefore cannot be underſtood to operate to the excluſion of Sir Chriſtopher Pigott, any more than it does every year to the excluſion of many other gentlemen, who vacate their ſeats by the acceptance of offices, and are re-elected.

tion Stated on the Caſe of Sir Charles Pigott.

I did not expect to read ſo fair and unreſerved a confeſſion as this writer gives us, "that there was no reaſon to hope that the merits of the "Middleſex petition would be conſidered by the Houſe of Commons "free from the influence of their former vote." This is an avowal that the deciſion on the return in the *abſence of the parties* was concluſive on the ſubſequent hearing, when the freeholders were for the firſt time before the Houſe. If this was not a "*mockery of juſtice*," I wiſh to know what was: and if "the former vote determined the merits of the petition," I wiſh to know *when* the parties were heard, and whether they *have been heard at all*. But the electors are taught what to expect in *common caſes*, where there are no "*particular circumſtances*," nor any "*obvious reaſons*" for treating them with the *outward* appearances of decency and regard to juſtice. They are *then* to expect an *extrajudicial* determination, not only *prejudging* the future hearing, but made *irrevocable* in the *abſence* of the parties, without the *pretence* of maintaining *even the appearance* of reſerving a hearing for the parties concerned.

P. 5.

Confeſſion in that Anſwer that the Deciſion on the Return determined the merits of the Election before the Petitioners were heard.

As little did I expect that this ſame writer would in the very firſt ſtep taken in the examination of a *queſtion of right* confound power and right together, and argue, that, becauſe the Houſe has *the power* of doing intolerable injuſtice, it therefore has *a right* to do it. "The Houſe, ſays "he, has the power of expelling *to-day*. It has therefore the ſame power "of expelling *at any future time*, unleſs ſuch power be expreſsly limited "by law. There is no ſuch law, nor any precedent of an acknowledg- "ment by the Houſe of any ſuch limitation. The power of abſolute "excluſion repeated *from time to time* is *equivalent* to the power of *render-*

P. 7, 8.

The Argument there, that the Power of repeatedly expelling implies the Power of diſabling.

" *ing incapable*. Therefore a power in the Houſe to expell *implies* and " *includes* a power to render incapable."

The beſt anſwer to this argument is to ſtate to the reader what muſt be this writer's idea of the power of the Houſe of Commons. Firſt negatively: it is not that which I have been always ſimple enough to think it, a great power, uncontrolable in many inſtances by any other authority, limited however not only by the *law of the land*, but by thoſe known laws of *natural juſtice* which limit and controll the greateſt powers in every ſtate. But it is a monſtrous power, that can overturn the fundamental principles of juſtice, act againſt reaſon, repeat puniſhment as often as it pleaſes, unlimited by any thing but poſitive laws, or, what we have little reaſon to expect, its own reſolutions.

I cannot take my leave of theſe writers without an obſervation on the manner in which they very ingeniouſly ſhift the queſtion. At the firſt ſetting out, Mr. Wilkes's incapacity is ſaid to be according to the *law and cuſtom* of Parliament. To prove this, the Journals are well-examined; not the *leaſt trace* can be found of any ſuch cuſtom. The ground is immediately changed, and, inſtead of the law and cuſtom of Parliament, deduced from a long ſeries of uniform judgments and declarations, conformable to good ſenſe and the principles of the common-law; we are preſented with half a dozen *ſtraggling reſolutions* for divers purpoſes, contrary to good ſenſe, not warranted by any principles of the common-law, and often contradicting one another.

Now I deny that one two or three precedents make the *law of Parliament*. But, if theſe gentlemen think it *wiſe* to take the other ſide, I will meet them *on their own ground*, and ſay, that where the incapacity is *known* to be legal, and one that we are *all agreed in*, at the ſame time *ſtaring in the face of all the conſtituents*, ſtill the votes are not *thrown away*, nor is the *ſecond on the poll* to be admitted as the *legal* Member.

In ſupport of this aſſertion, I will quote a ſingle precedent; and then I am juſt as ſtrong in my aſſertion, as my adverſaries are in moſt of theirs. The incapacity of Returning Officers, to be elected at the places where they preſide, comes I think very fully within the diſcription I have juſt given.

Caſe of Lyme Regis as ſtrong on one Side as many of the Precedents are on the other.

Feb. 1727, the Mayor of Lyme Regis (Returning Officer for that place) had returned himſelf. Mr. Henly petitioned. Reſolved, nem. con. that the Mayor was not capable of being elected, and returned. Mr. Henly's petition was however referred, as to the *complaint* that he though duly elected was not returned: and he was not adjudged *duly elected*, till he had eſtabliſhed a *majority* above the Mayor. If theſe gentlemen will *ſtill* hold, that the law of Parliament can be laid down from a *ſingle precedent*, from only *one* reſolution and judgment of the Houſe of

Commons, I infer from this caſe that if the incapacity of Mr. Wilkes had been as *legal and known* as the incapacity of a Returning Officer at the place where he preſides, ſtill Mr. Lutterell ought not to have been adjudged duly elected, unleſs he could have proved a *majority* above Mr. Wilkes, in like manner as Mr. Henly proved one above the Mayor of Lyme. This was not done: therefore Mr. Lutterell ought not to have been adjudged duly elected.

If I have *ſeemed* to attend leſs to the writer of the Caſe Conſidered than either or any of the other writers; he will, I hope, excuſe me. I believe he will find that I have either obviated or anſwered all his arguments. I confeſs, however, that there is much in that pamphlet which I mean not to anſwer: for there is much not at all to the purpoſe. It is not unuſual with good writers to ſet up imaginary diſputants, put arguments in their mouths which no man in his ſenſes ever thought of uſing, and then refute them. The author of the Caſe Conſidered is excellent in this mode of writing. I beg leave therefore to enter my caveat againſt any advantage being taken of my ſilence, as if I meant to admit what I do not intend to anſwer; and to juſtify that ſilence by ſtating as clearly as I can, what I apprehend is in diſpute, and what is not. State of the Diſpute.

The queſtion is not, whether there is a law and cuſtom of Parliament, and whether they are a part of the law of the land. We are *agreed* on theſe facts. But we contend on our ſide, that this law and cuſtom are not things of *inſtantaneous creation*, to paſs into force whenever the Houſe of Commons ſhall be pleaſed to give them life and vigour, by reſolutions worded in a *declaratory ſtyle*. The deciſions of the Houſe of Commons *muſt* be governed by that law and cuſtom; but *cannot make them:* and it is not only fair, but wiſe and neceſſary, upon any declaration publiſhed by the Houſe, to examine the authorities upon which it is ſupported.

Neither is there any queſtion on the judicature of the Houſe of Commons in matters of election, and over its own Members as ſuch. We *admit* it, though *not in the ſame degree*, nor in both caſes *ſole and excluſive*, nor *infallible* in either caſe, as no human judgments are. Upon the judicature in elections the author of the Caſe Conſidered is very full and very learned. I paſs over the whole of that diſpute, as it appears to me not *neceſſary* to the deciſion of the preſent queſtion.

The power of the Houſe to expell its own Members is not diſputed. But we deny the ſufficiency of the precedents to juſtify the power of *diſabling* by a reſolution of the Houſe only.

We deny the concluſion, that expulſion implies a diſability, as *illogical*, *unreaſonable*, and contradicted, not only by the *language*, but by the *practice* of the Houſe.

Laſtly, we cloſe our argument by contending, that, ſince the diſability ſet up is not founded in good ſenſe and reaſon, nor in the law and cuſtom of Parliament, nor in either the common or ſtatute-law, the freeholders were *not bound* to take notice of the reſolution of the Houſe declaring ſuch incapacity, and *did not throw* away the votes they gave for Mr. Wilkes. If we are right in this, it follows that Mr. Lutterell *is not duly elected:* and unleſs the judgement given in his favour be in ſome proper manner corrected, it will become a precedent of very dangerous conſequence to the freedom of elections, which will be no longer governed by the *known laws of the land,* but by *occaſional votes of one Houſe of Parliament.*

CHAP. IX.

Danger from tranſgreſſing the Bounds preſcribed by Law—the Expediency of Expulſions conſidered.—Poſſibility of the Elected turning their Powers againſt their Conſtituents.—The Checks provided by our Conſtitution againſt Abuſe of Power—by the Crown—or by the Repreſentatives.—Neceſſity of adhering to the Law of the Land, proved from Mr. Pym's Speech, King Charles's Declaration, and Lord Chief Juſtice Holt's Argument.—The ill Conſequences of this Deciſion, ſo far as they may affect the Conduct of Members of the Houſe of Commons.—The Rights of Electors cannot be taken away but by Act of Parliament—how this Precedent tends to varying the Rights of Election in all Places, and particularly to extend the landed Qualification of Electors for Counties.

Danger from tranſgreſſing the Bounds preſcribed by Law.

TO tranſgreſs antient limits, to venture *one ſtep* beyond the line preſcribed by law, is a proceeding big with danger. The fatal conſequences of it are never ſufficiently foreſeen: and we are half undone, before we ſee half the danger.

The Expediency of Expulſions conſidered.

It is always humane, it is *ſometimes wiſe,* to overlook offences. If the rigorous meaſure of expelling a Member is propoſed, the probable conſequences of it ought to be well conſidered. The publick looks for *wiſdom* as well as juſtice in public proceedings. Where it is probable that the expelled Member may have intereſt enough with his conſtituents to obtain his re-election, the reſolution to expell him ſhould be taken with great caution, and upon much conſideration. A reaſonable man's conſcience might be *prudent* in ſuch a caſe. For the expulſion may lead to an unhappy queſtion, between the dignity of the Houſe, and the rights of the people. The re-election of the expelled Member may undoubtedly be

underſtood, as a reverſal of the cenſure and judgment of the Houſe. However unpleaſant it might be to ſubmit to ſuch diſgrace, we *now* know the conſequences of contending againſt it.

That Houſe, which acquired its privileges, and has been *uſed* to claim them, as "*the undoubted birthright and inheritance of the ſubjects of this realm*," is brought into a conteſt with its conſtituents: the *privileges* of the Houſe, and that *reverence* and *reſpect* which every good man muſt wiſh may attend its judgments, on one ſide; and the *common rights* of the people on the other. The *elected* lay claim to a power of dangerous conſequence to the rights of the *electors*, operating as a negative on their choice, by declaring an incapacity *not known* in our law *before ſuch declaration*; and admitting as a Member one of the candidates who had not the majority of *ſuch votes* as were legal *at the time of taking the poll*.

It is become almoſt dangerous to confeſs, that there were ſome who could have been well ſatisfied with keeping the vacancy open *for a time*, who wiſhed to prevent further miſchief by iſſuing no new writ during *that ſeſſion*, and were very averſe to the extrajudicial interpoſition of the Houſe. Commendable as they were for temper and prudence, they have been ſomewhat miſrepreſented, and much cenſured. But let me aſk, is there no difference between keeping the place open for *part of a ſeſſion*, and filling it up for *ſeven years?* between reſting it upon a reſolution taken in purſuit of the privilege, and driving it to a formal judgment on the determination of a cauſe? The one might be eaſily reſcinded by the act, or even by the acquieſcence, of the Houſe, in the *following ſeſſion*. But how to reverſe the other, *even in any part of the ſame Parliament*, is not very eaſy to ſay; and the conſequences of leaving it unreverſed are very manifeſt. Serious Conſiderations, p. 19, 20, and 21.

The difference between leaving this matter on the ground of privilege, and confirming it by a legal judgment, puts me in mind of a diſtinction made by Lord Clarendon, between the loan of five ſubſidies exacted by prerogative, without any legal judgment in ſupport of it, and the charge of ſhip-money, confirmed upon a ſolemn hearing before all the judges. I will give the obſervations of the Hiſtorian, in his own words: "When the people heard ſhip-money demanded in a court of law *as a right*, and found it by ſworn judges of the law *adjudged* ſo, upon ſuch grounds and reaſons as every ſtander-by was able to ſwear was *not law*, and ſo had loſt the *pleaſure* and *delight* of being *kind* and *dutiful* to the King; and, inſtead of *giving*, were *required to pay*, and by a logic that left no man any thing that he might *call his own*: they no more looked upon it as the caſe of *one man*, but the caſe of the kingdom; nor as an impoſition on them by the King, but *by the judges*, which they thought themſelves *bound in conſcience* to the public juſtice not to ſubmit to." It ſavours too much of wantonneſs; it marks a forwardneſs and prejudice; to Vol. I. p. 69.

be reſtleſs and impatient for proſecution and puniſhment; to *drag* the cauſe to the bar before the complainants bring it, and to hurry into a kind of engagement as *parties*, where you may be afterwards to ſit as *judges*.

When Mr. Walpole was re-elected, no return was called for till the electors applied to the Houſe. When Mr. Wilkes was re-elected, not a ſingle freeholder alledged a grievance, and came to the Houſe for juſtice. What the Houſe did was therefore *ſpontaneous*; and unneceſſary, becauſe *not called for*. It was very well known, that Mr. Wilkes had been from time to time re-elected; but it was not known *in form*. No petition *againſt his election* prayed the judgment of the Houſe. The only petition which came, did in fact complain of the *proceedings of the Houſe*, and pray a hearing in a cauſe *prejudged* in the abſence of the parties. Then it was that counſel were ſeen at the bar, defending the *right* of Mr. Lutterell to a ſeat, which neither he nor his friends had *thought proper* to petition for. All this was foreſeen, and the ſtate in which we now are: and they have no reaſon to be aſhamed of their moderation, who wiſhed the Houſe to *overlook* what it was *not obliged to ſee*, inſtead of bringing the evil to that paſs that "*nec vitia noſtra, nec remedia pati poſſumus.*"

Poſſibility of the Elected turning their Powers againſt their Conſtituents.

The fears and jealouſies of the people are not ill-founded. One muſt forget half of what one has read in hiſtory, if one can reſt ſatisfied, that the elected are *incapable* of turning their powers againſt thoſe who choſe them. It would be ridiculous to cite caſes to the contrary. They may be found in the hiſtory of every country, where any of the legiſlative or executive parts of government are elective.

It is a wiſe and a happy part of our conſtitution, that aſſigns to a ſelect number choſen by the people, the exerciſe of thoſe powers which are in the Commons of the whole kingdom. But we muſt not forget that *that ſelect number* conſiſts of *delegates*, not *principals*; truſtees, veſted with great authority, *not for their own benefit*, but for the benefit of *thoſe who choſe them*. It is full as neceſſary to diſtinguiſh between the elected and the electors, as between the King and his people. The elected are the *creatures* of the people; the King is their *common father*: but both act under a *truſt* which the conſtitution of this country ſuppoſes *may be abuſed*.

The Check by [illegible] of Power.

It is good policy to preſume that great powers *will be abuſed*, where-ever they may be placed. The excellence of our conſtitution is, that there is a check on every power exiſting in it: and the probability of its continuance depends upon conſtantly maintaining thoſe checks in their full effect and vigour. This cannot be done, unleſs there is a *conſtant* jealouſy, and apprehenſion of abuſe.

By the Crown.

It is a maxim in our conſtitution, *that the King can do no wrong*. But the ſame law which holds this language on the *power of the King*, looks to the *ſecurity of the ſubject*, and provides that, where wrong *is done* on the

part

part of the Crown, the Miniſter who adviſed the meaſure, and the Officer who executed it, ſhall be anſwerable for the evil. There could not be a greater abſurdity in any conſtitution, than to have provided thus againſt the Sovereign, and at the ſame time to have abandoned every thing to the will of the Repreſentatives.

The Houſe of Commons has the ſole and ſupreme judicature in matters of election. How ſoberly, juſtly, and uprightly, it has exerciſed that judicature, let the Journals teſtify, and daily experience bear witneſs. It is *ſupreme* and *uncontrollable*; but the law has pointed out the rules by which it is *bound* to exerciſe its judgment, the ſame rules of common and ſtatute-law which bind other courts in the exerciſe of theirs. The Houſe of Commons is alſo ſole judge *of its privileges*, ſo as to *puniſh* for the breach of them. It neceſſarily, as incidental to that judicature, has the power of *declaring* what are its privileges; but not ſo abſolutely and arbitrarily, that whatſoever it declares to be its privilege, is to be conſidered as ſuch. For the law of the land *gives*, and *limits* that privilege: the Houſe can neither uſurp a new privilege, nor give up an old one. or by the Repreſentative.

Theſe are powers entruſted with the elected for the benefit of the electors, upon *ſpecial truſt and confidence* that they ſhall not be abuſed. If they are, the remedy may not be in any *ordinary courſe*: but, however unuſual may be the practice, the ſubject has a *right* to fly to the crown for *protection*, by virtue of that prerogative which it poſſeſſes *for the public good*.

It would be right in thoſe who poſſeſs great and unlimited powers, to have in their conſtant remembrance, what was well ſaid by Mr. Pym at the trial of Lord Strafford, and afterwards retorted by King Charles the Firſt upon his Parliament: "The law is that which puts a difference "betwixt good and evil, betwixt juſt and unjuſt. If you take away the "law, all things will fall into confuſion. Every man will be a law to "himſelf, which, in the depraved condition of human nature, muſt needs "produce many great enormities. Luſt will become a law; and envy "will become a law; covetouſneſs and ambition will become laws: and "what dictates, what deciſions, ſuch laws will produce, may be eaſily "diſcerned. The law is the *ſafeguard*, the *cuſtody*, of all *private inte-"reſts*. Your honours, your lives, your liberties, and your eſtates, are in "the *keeping of the law*. Without this, every man hath a *like right to any "thing*." Neceſſity of adhering to the Law of the Land, proved from Mr. Pym's Speech, K. Charles's Declaration, and L. C. J. Holt's Argument.

King Charles follows up this reaſoning with ſomething further very applicable to both Houſes of Parliament. "For it is not to be imagined, that one Houſe ſhall ſet itſelf free from the fetters of the law in matters *of election and privilege*; and the other not aſſume the like liberty in its judicature, *or appeals and writs of error*. "Without him, and againſt his "conſent, the votes of either, or both Houſes together, muſt not, could "not,

" not, ſhould not (if he could help it, for *his ſubjects ſake*, as well as *his* " *own) forbid* any thing that was *enjoined by the law*, or *enjoin* any thing " that was *forbidden by the law*. He doubted not, but that all his good " ſubjects would eaſily diſcern, in what a miſerable inſecurity and con- " fuſion they muſt neceſſarily be, if deſcents might be altered, purchaſes " avoided, aſſurances and conveyances cancelled, the ſovereign legal autho- " rity deſpiſed and reſiſted, by *votes or orders of either or both Houſes*."

In the famous caſe of the Ayleſbury men, upon the motion for an *habeas corpus*, that great and intrepid Judge Lord Chief Juſtice Holt delivered an argument, which ought never to be forgotten. He ſaid, among other things, " Their impriſonment was not ſuch as the people of Eng- " land ought to be *bound* by: and it did *highly concern* the people not to be " *bound* by a *declaration* of the Houſe of Commons in a matter that *before* " *was lawful*. Neither Houſe of Parliament has a power to diſpoſe of " the *liberty or property* of the people; for that cannot be done but by the " Queen, Lords, and Commons: and this is the ſecurity of our Engliſh " conſtitution, which cannot be altered but *by act of Parliament*. The " Houſe of Commons are *judges* of their own priviledges: but the *law* " muſt alſo be obeyed. When ſubjects have a *right* to bring actions, " they cannot be *ſtopt* but by act of Parliament: for no priviledge can " extend ſo far as to *take away a man's right*. Nothing can make a pri- " viledge, which was not ſo before, for the breach of which a man ſhall " loſe his right, *except an act of Parliament*. The Judges are bound to " take notice of the *cuſtoms* of Parliament; for they are *part* of the law " of the land, and there are the *ſame methods* of knowing it as the law " of Weſtminſter-Hall. It is *the law*, which gives the Queen *her pre-* " *rogative*; it is *the law*, which gives *juriſdiction* to the Houſe of Lords; " and it is *the law*, which *limits the juriſdiction* of the Houſe of Com- " mons."

The Conſequences of this Deciſion ſo far as they may affect the Conduct of Members of the Houſe of Commons.

If theſe obſervations had been better attended to, we ſhould not have been diſtracted ſo frequently as we have been, with the *law and cuſtom of Parliament*, which have been too often perverted into ſomething ſo vague, and ſo uncertain, that the writers on the laws of England are afraid to touch upon them. " *Ab omnibus quærenda eſt, a multis ignorata, a paucis* " *cognita*." No man can read what Lord Coke writes on the tranſcendency of this law and cuſtom, and obſerve the profound reſpect and reverence with which that learned man *affects* to treat them, and not confeſs, that the Chief Juſtice was in a merry mood, and meant to convey pretty nearly in the words of the author of the Anſwer to the Queſtion Stated, " It it the diſtorted child of folly and indiſcretion: it is a jumble " of precedents for every thing, and any thing."

Not

Not only elections ought to be free; but the members ought to be well aſſured, that they may debate without fear, and correſpond with their conſtituents in perfect ſecurity. *Now* a member may be expelled for writing to his conſtituents a fair, modeſt, and honourable account of his own conduct. For it muſt be impoſſible to vindicate his own conduct without cenſuring that which he oppoſed. In the warmth of a debate an intemperate leader may take offence. The Houſe may be *complaiſant enough* to make the quarrel its own. The offender may be brought to the bar immediately and expelled. A free animadverſion on *the worſt letter* that a Secretary of State could write may be taken up by the Houſe as a ground for expulſion. *Any impriſonment* for *any offence*, conviction for a crime for which the *pillory might have been ordered*, and, upon the ſame principle, for which ſentence of impriſonment *might have paſſed*, all theſe are *now* held fit and juſtifiable cauſes of expulſion. Ample proviſion is made for removing from the Houſe all troubleſome Members, who are offenſive to a great Leader, and diſturb his reſt. Incapacity for the reſt of the Parliament, perhaps in the prime of their lives, in the moſt important part of that Parliament, is to follow as the neceſſary conſequence of the expulſion. The ſeverity of this *new* law of Parliament will be felt equally by the *electors* and elected. Their country will want the ſervice of the expelled Members: in bad times every good man is of great value. While on the other hand, wicked and abandoned Miniſters will have ſecured ſucceſs to their deſperate deſigns, by removing their principal opponents and intimidating the reſt.

The judgment in queſtion is confeſſedly not a judgment upon the *ſtatute law*; it is not upon the *law*, nor by the *cuſtom, of Parliament:* For the precedents, and the general courſe of proceedings in the Houſe of Commons, are againſt it. It is not founded on the *opinion of learned men*, thoſe ſages who have left us their collections and obſervations on the laws of this country; nor on any *tradition* delivered down from ancient times. The circumſtances of the caſe *taken altogether* are new; even Mr. Walpole's caſe differs eſſentially from it, and ſuggeſts ſtrong and convincing arguments againſt the power of the Houſe, *to diſable* in conſequence of an expulſion, and ſtill ſtronger againſt its power to admit the *ſecond on the poll* in conſequence of ſuch diſability.

It is a moſt dangerous thing to allow to any Houſe of Commons, or to any court, ſuch latitude of conſtruction either of the common or ſtatute law, as may impair and diminiſh the rights of the electors. In other caſes, that conſtruction which *moſt extends* their right is *moſt favoured*. I have ſeen it laid down in our law books, that all reſtraints upon common right, whether by charter, bye-law, or uſage, are to be ſtrictly conſtrued; and with regard to the right of electing to public truſts, no charter

charter nor bye-law can in any reſpect leſſen, or confine it to a ſmaller number than that in which the antient law has placed it.

The Rights of Electors cannot be taken away but by Act of Parliament.

No authority leſs than the whole Legiſlature can take away the *right* of a ſingle elector. In a late inſtance, a *doubt* whether certain cuſtomary freeholders had a right to vote in elections of Knights of ſhires, was not left to be decided by a reſolution of the Houſe. An *act of Parliament* was thought neceſſary to declare they had not; however ſatisfactory might be the treatiſe wrote by Dr. Blackſtone to prove, that the claim they ſet up was ill founded. They were in poſſeſſion, at leaſt in ſome places, and therefore conſidered as not fit to be removed but by act of Parliament.

How this Precedent tends to varying the Rights of Election in all Places, and particularly to extend the landed Qualification of Electors for Counties.

In the preſent caſe, the electors in general are in poſſeſſion of the *right* of returning whom they pleaſe, not being diſqualified by the *known laws* of the land. A *new* diſqualification is ſet up by a *vote of one Houſe of Parliament*, not known before, *attempted* in the caſe of Mr. Walpole, *imperfectly executed* then, and *never acknowledged*. This is now carried into effect, and a member ſits confeſſedly *upon a minority of votes*.

The precedent will hardly ſtop here; temptations will daily preſent themſelves. The influence of the Crown, within the Houſe and out of it, grows immenſely. We do not diſcover that ſpirit of diſintereſtedneſs and independence, that firmneſs and virtue, ſo neceſſary to encounter this influence, and prevent its fatal effects. The time perhaps is not very diſtant, when we may ſee the moſt hideous monſter that was ever produced; a Houſe of Commons ſervile and abject to the Court, licking the duſt from the feet of the Favourite, haughty, arbitrary, and tyrannical to thoſe who gave it being.

Then the *rights* of the electors will be things to be *laughed at*. Upon the principle, that the *vote* of the Houſe once given in a caſe competent to its ſupreme juriſdiction is the *law of the land*, which of thoſe rights will be any longer ſecure? The ſame authority which, under *pretence* of declaring the law, may ſet up a diſqualification not known to the law of the land, nor to be found in the hiſtory of Parliament, will play with its judicature at pleaſure, and tranſfer the rights of election from one ſet of men to another as ſhall beſt anſwer its own purpoſes.

It is but one little ſtep further, and the Houſe may reduce the number of freeholders to the wiſh of a miniſter. Stealing above 12 *d.* is grand larceny by an act of parliament, 3 E. I. Criminal courts are as liberal as they can be in the execution of that law. If no evidence of the value is given by the proſecutor; or if that value is not fixt accurately, the judges will often recommend it to the jury, or at leaſt tell them that they are at liberty to find the value of the things ſtolen under 12 *d.*; having reſpect to the great alteration in the value of money ſince the paſſing of that

that act. This liberality, being in favour of life, and not carried ſo far as to *diſpenſe* with the law by a *poſitive direction*, where the value of the things ſtolen is *aſcertained* by evidence, is very commendable.

By ſtatute 8 H. VI. c. 7. *Forty ſhillings a year* in freehold lands give the freeholder *a right to vote*. Whatever reſtraints have been ſince impoſed upon him, they have been impoſed, not by a *reſolution* of the Houſe, but by *act of Parliament*. If this *latitude of conſtruction* is permitted in one Houſe only, and the competency of the Houſe entitles its deciſions upon the rights of the electors to be conſidered as the law of the land, have we not reaſon to fear that it may become a queſtion to be decided there, whether the *forty ſhillings*, which give the freeholder his qualification, ſhall be conſtrued according to the value of money *in the time of H.* VI. or according to its preſent value? Dr. Blackſtone has *already* made the computation. He tells us, in his Commentaries, that *forty ſhillings in the time of H.* VI. are equivalent to *twenty pounds in our time*. And if a Houſe of Commons ſhould hereafter be inclined to put that conſtruction upon the qualification of a freeholder, and fix it at *twenty pounds* a year, I have no doubt that there might be found more than one court lawyer to argue, from the *liberality* with which the courts of law carry into execution the act of E. I. in caſes of grand larceny, from the *competency* of the Houſe to decide upon the rights of election, and from its *ſupremacy*, that it was a *good judgment*, and *well founded in common law*.

Vol I. p. 167.

CONTENTS.

CHAP.

CHAP. IX.

THE END.